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Bombay High Court Reports.

VOLUME VII.

REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF BOMBAY.

1870.

EDITED BY

CHARLES F. FARRAN, B.A.,

(Of The Middle Temple,)

BARRISTER-AT-LAW.

Bombay:

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Original Civil Jurisdiction.

CHARLES F. FARRAN, B.A., Barrister-at-Law.

Appellate Civil Jurisdiction.

KHANDERA'V CHIMANRA'V BEDA'RKAR, B.A., LL.B.

MAHA'DEV GOVIND RA'NADE, M.A., LL.B.

N B 26

Crown Cases.

CHARLES F. FARRAN, B.A. Barrister-at-Law.

KHANDERA'V CHIMANRA'V BEDA'RKAR, B.A., LL.B.

MAHA'DEV GOVIND RA'NADE, M.A., LL.B.

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ERRATA, CORRIGENDA, ET ADDENDA.

PAGE		
11	O.C.J.	Line 3 from top of page, *for* "*Earl*" *read* "*Earle*."
19	,,	Line 16 from top of page, *for* "pe" *read* "per."
67	,,	Line 15 from top of page, *for* "before" *read* "below."
70	,,	Line 21 from top of page, *before* "mortgages" *omit* "in."
83	,,	Line 9 from bottom of page, *for* "defendnats" *read* "defendants."
89	,,	Line 3 and 4 from top of page, *for* "execution-creditor" *read* "execution-debtor."
101	,,	In footnote (*f*) *after* "Ambler" *insert* "70."
115	,,	At end of line 9 from top of page, *for* "daopted" *read* "adopted."
116	,,	Line 8 from top of page, *for* "benefits" *read* "benefit."
135	,,	Line 17 from top of page, *for* "upposition" *read* "supposition."
,,	,,	Line 18 from top of page, *for* "seven" *read* "even."
141	,,	Line 19 from top of page, *for* "Steel" *read* "Steele."
155	,,	Line 12 from top of page, *for* "*Jipperah's*" *read* "*Tipperah's*."
161	,,	In note *for* "Se" *read* "See."
171	,,	Line 17 from top of page, *for* "stay" *read* "say."
172	,,	Line 8 from bottom of page, *for* "Tulsidás Kisandás" *read* "Amirchand Máṇikchand."
174	,,	Line 25 from top of page, *for* "September" *read* "December."
175	,,	Line 14 from top of page, *for* "sinc" *read* "since."
17	A.C.J.	Line 1 from bottom of page, *after* "1861" *insert* "at the request of S. N. Tagore, Assistant Judge, before whom the suit came on appeal."
52	,,	Line 12 from top of page, *for* "on" *read* "no."
,,	,,	Line 12 from bottom of page, *for* "rrebuttable" *read* "irrebuttable."
,,	,,	Line 16 from bottom of page *for* "and" *read* "land."
62	,,	Line 5 from top of page, *for* "mortgagee" *read* "mortgage."
142	,,	Line 6 from bottom of page, *before* "character" *omit* "the."
3	CR.CA.	Line 4 from top of page, *for* "Act VII. of 1869" *read* "Act VII. of 1867."
45	,,	Line 19 from top of page, *for* "such such act" *read* "each such act."
46	,,	Line 6 from bottom of page, *for* "*Patridge* v. *Shaw*" *read* "*Patridge* v. *Naylor*."
55	,,	In marginal note, *for* "pound-keepert" *read* "pound-keeper."

CASES

DECIDED IN THE

ORIGINAL CIVIL JURISDICTION

OF THE

HIGH COURT OF BOMBAY.

Referred Case.

1870.
Jan. 7.

THOMAS MATHEWS *et al.* ..... *Plaintiffs.*
GIRDHARLA'L FATECHAND..... *Defendant.*

Forged Government Promissory Note—Payment of Forged Note—Notice of Forgery—Delay.

A person who receives a forged currency note in payment is not (in order to entitle himself to be paid a second time), upon discovering the forgery, bound to give immediate notice of it to the person from whom he receives the forged note, the rule relating to forged acceptances on bills of exchange not applying.

Semble—that if the delay in communicating the fact of the forgery of the note were so great as to damnify the payer of it in his remedy against, or in his power of tracing, the person from whom he received the note, such delay would be a good defence in an action brought upon the original consideration.

CASE stated for the opinion of the High Court, under Sec. 55 of Act IX. of 1850 and Sec. 7 of Act XXVI. of 1864, by John O'Leary, First Judge of the Bombay Court of Small Causes:—

"In this case, which was tried before me on June 23rd, 1869, the plaintiffs claimed Rupees 1,000 from the defendant, being the balance due to the plaintiffs on certain *hundis* accepted by the defendant and at one time held by the plaintiffs. The *hundis* in question were, at the time of the trial, in possession of the defendant and produced by him on subpœna.

"The technical defence was payment.

1870.
MATHEWS *et al.* *v.* GIRDHARLA'L FATECHAND.

"The facts of the case were very clearly proved by the plaintiffs, and were hardly disputed by the defendant. They were as follows:—On the 27th of April last the plaintiffs held certain *hundis*, accepted by the defendant, amounting in all to Rupees 3,500. On that day one Jejvern Vaklamal went to the plaintiffs on the part of the defendant and paid to the clerk of the plaintiffs, named Frámji Jamsetji, what purported to be Rupees 3,500 in currency notes. He paid three notes purporting to be for Rupees 1,000 each, and ten notes of Rupees 50 each. These notes were, after careful examination, received by the plaintiffs' shroff, Frámji, and the *hundis* (or *khokhás*, as they are termed when paid and cancelled) were returned. On the morning of the next day, at about 11 A.M., the plaintiffs ascertained that one of the notes so paid to them by the defendant, and which purported to be a currency note for Rupees 1,000, was a forgery. I consider it unnecessary to state the test by which the note was proved not to be genuine; but it appears to me material to state that the forgery in this case was exceedingly cleverly executed, and, as was proved by skilled witnesses in the case, the note in question would probably be received as genuine by any firm of merchants in Bombay, and possibly would not be detected at a bank. The facts of the forgery having been ascertained at about 11 A.M. on the 28th of April, the plaintiffs sent two of their clerks in the course of that same day to the defendant's place of business. One of these clerks, Mehervánji Hormasji, thus described what took place at the defendant's:—'We went to the defendant's that day (April 28th). We said to the defendant that he had paid us one note too few on the previous day. If we had told him it was a forged note he had paid us, he would not have shown us his book. We saw the defendant's book. We saw that the numbers of the notes had not been taken by the defendant. We then went to the Commissioner of Police. We said nothing that day to the defendant about the forgery.' On the next day, April 29th, at 11 or 12 o'clock, the plaintiffs sent a notice of the forgery to the defendant.

"On this state of facts, Mr. Latham, for the defendant, con-

tended that the plaintiffs were precluded by their lâches from recovering the amount of the forged note from the defendant; and also that the acts of the plaintiff, in receiving the notes and returning the *khokhás* cancelled, must be taken as an absolute discharge of the *hundis* as against the acceptor. Mr. Latham chiefly rested his argument on the case of *Cocks* v. *Masterman* (*a*). On the other hand, Mr. Ferguson, for the plaintiffs, argued that, in the first place, a person who has through mistake received a forged currency note in payment of a debt is entitled at any time, subject to the law of limitation, to recover the debt so supposed to have been discharged, and that he is not bound to give notice of the forgery; and, secondly, that, on the well-known rule on the subject, the plaintiffs, having given notice of the forgery on the day after they had notice themselves, were in time, even supposing notice to be necessary in such a case.

"It appeared to me, chiefly on the cases of *Camidge* v. *Allenby* (*b*) and *Robson* v. *Oliver* (*c*), that notice of the forgery was necessary in the present case. I held that the ordinary rule in such cases was that notice of dishonour must be given, if possible, on the day after the dishonour. But I held that the foundation of the rule in such cases was this: that the holder of a dishonoured note is bound to use due diligence in giving notice to prior parties whom he seeks to make liable; that if he give notice on the day after he himself has notice, the courts will presume that he has exercised due diligence, and will not in ordinary cases inquire whether he might not have given notice some hours earlier. I was of opinion, further, that in the true spirit and meaning of the rule as laid down in *Rowe* v. *Tipper* (*d*) the essence of it is either that the plaintiff has, or is presumed to have, exercised due diligence, and that a party who, on the day he himself has notice of the forgery, does communicate with the party whom he seeks to hold liable on the subject of the forged note, and in so communicating with him purposely conceals from that party notice of the forgery, cannot be said or be

(*a*) 9 B. & C. 902; S. C. 8 L. J., K. B. 77. (*b*) 6 B. & C. 373.
(*c*) 10 Q. B. 704. (*d*) 13 C. B. 249.

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MATHEWS *et al.* *v.* GIRDHARLA'L FATECHAND.

presumed to have used due diligence in giving notice. Had the plaintiffs done nothing on the day they had notice of the forgery, I should undoubtedly have held they were in time in giving notice on the following day. I find on the evidence that they did give a notice on that day with respect to the transaction to the defendant, and that the notice so given to the defendant purposely withheld from the defendant all knowledge of the forgery, and wilfully misled him as to the facts. Under these circumstances, and on the authority of *Cocks* v. *Masterman*, I was of opinion the plaintiffs could not recover."

Notice above referred to:—

"29th April 1869.

"GIRDHARLA'L FATECHAND.

"SIR,—We are instructed by Messrs. Grindlay, Groom, & Co., to call upon you to pay them the sum of Rupees 1,000, the amount of a forged note passed by you to them on the 27th of April last, in part payment of two *hundis* drawn on you. We have also to call upon you for an explanation of the reason for your uttering a forged note, and we have to inform you that unless the amount be paid before 11 o'clock to-morrow, and a satisfactory explanation given as to the matter, proceedings, civil or criminal, as may be considered advisable, will be at once commenced against you.

(Signed) "MANISTY AND HURRELL."

The case was this day argued before COUCH, C.J., and BAYLEY, J.

Marriott (with him *Ferguson*), for the plaintiffs:—The cases relied upon by the First Judge do not apply. The plaintiff was under no obligation to give notice to the defendant that the note was a forgery. The rule that notice must be given immediately when a forged acceptance is paid by mistake, as in *Cocks* v. *Masterman*, is founded upon the peculiar rule relating to notice that governs bills of exchange and other negotiable instruments of that class—that parties liable upon them are discharged if they do not receive due notice of dishonour. By reason of the fact of dishonour not being communicated to him the holder of the bill loses his remedy against prior parties to it. The plaintiff here was paid by means of a worthless piece of paper, upon which no one was liable, and the defendant has lost no remedy

against any one. In *Camidge* v. *Allenby*, relied upon by the First Judge, the judgment turned upon the fact that the defendant had, by the lâches of the plaintiff, lost his remedy against the person who gave him the note. And in the judgment of Littledale, J., it is intimated that it would have been different if the notes there had been forged.

If the plaintiff was bound to give notice, he has done so in sufficient time. [COUCH, C.J. :—It is found that the plaintiff was guilty of delay in not giving notice earlier, as he might have done. The only question appears to be—was notice necessary.] By the delay of the plaintiff the defendant in this case has not been, nor could he be, damnified; as, though he may have possibly been delayed, he has not lost his remedy against the individual who gave him the note. [BAYLEY, J., referred to *Jones* v. *Ryde* (*e*), *Woodland* v. *Fear* (*f*), and *Gurney* v. *Womersley* (*g*).] *Westropp* v. *Solomon* (*h*) was also cited and relied on.

Latham, for the defendant :—The only issue is whether notice was necessary. It is submitted that it was. Payment was here made by a forged Government promissory note, between which and any other promissory note the law draws no distinction. There is no case directly in point on either side, but the rule laid down in *Camidge* v. *Allenby* applies. That case shows that a person receiving a promissory note payable on demand is bound either to circulate it or present it for payment within a reasonable time, and, if it is found to be worthless, immediately to give notice to the person from whom he received it; if he does not do so the latter is discharged. [COUCH, C.J. :—That is because by the want of notice the rights of the holder of the bill against other parties may be lost. I can find no authority for saying that if a paper like this turns out to be worthless the receiver must give immediate notice of his discovery that it is so.] There were no rights lost in *Camidge* v. *Allenby*; it is sufficient if

(*e*) 5 Taunt. 488. (*f*) 7 El. & B. 519. (*g*) 4 Ibid. 133.
(*h*) 19 L. J. C. P. 1.

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the person giving the note in payment may have been damnified. [COUCH, C.J.:—The only way you can put your case is, that if the defendant had got an earlier notice he might have found out the person from whom he received the note, and in that way he may have been prejudiced by such notice not having been sooner given. I am not prepared to say that a party might receive a forged note and retain it, knowing that it was forged, for such a length of time that the party from whom he received it might be thereby injured, or might reasonably be inferred to be injured, in his remedies against the person who gave it to him; but that case is not made here.] There was here even more than delay; there was concealment amounting to a misrepresentation, and the defendant may have been damnified. The rule relating to the payment of forged bills and notes, though originally it may have been founded upon particular instances, seems since to have grown into a general rule, which the Court will not limit in its application.

Marriott in reply.

COUCH, C.J.:—I think that the learned Judge of the Small Cause Court was wrong in applying the rule in *Cocks* v. *Masterman* to a case like this. The rule to be deduced from that and similar cases is, I think, this:—that where a person becomes possessed of a negotiable instrument which turns out to be forged, he must not, by his negligence, deprive the person from whom he received it of his right to take steps against the parties who may be liable to pay him; for, though the instrument may be forged as regards the acceptance, there may be other rights, arising out of the transfer, either by indorsement, where that is required, or by delivery where the instrument is payable to the bearer and is transferred by delivery only. But here the only liability upon the instrument being by reason of the signature, when that turned out to be forged, it was entirely valueless. On the instrument itself there was no right which could be reserved to the defendant by giving notice to others that it was forged. In principle, this is somewhat like the case of *Cundy*

v. *Marriott* (*i*), in which the Court of Queen's Bench held that where a bill indorsed by a debtor to a creditor was valueless for want of a sufficient stamp, so that there could be no remedy at law on it, it was not necessary that notice of dishonour should be given; and that the creditor, though he had not given notice of dishonour, might sue for the original debt. The only way in which possibly the defendant might avail himself of any neglect on the part of the plaintiff to communicate to him the fact of the note being a forged note is to my mind what I have already suggested—there might be a case in which, in consequence of delay in informing the party who paid the forged note of the fact of its being forged, he might have lost the means of tracing the person from whom he himself received it; and if a case of that kind were made out—if it were shown there had been such negligence, on the part of the person to whom the forged note was paid, in communicating the fact of its being a forgery, that the party paying it to him had been damnified, I am not prepared to say that it would not be a good defence in a suit like this. But in this case there is nothing whatever to show that any injury was caused to the defendant by the delay that took place in communicating the fact that the note was forged. It does not appear that the defendant lost any power which he had of tracing the note, and of enforcing any right he might have against the person who paid it to him, or that he was damnified in any way. Under these circumstances, I think the rule deducible from the case of *Cocks* v. *Masterman* does not apply.

If we are to apply a rule, we must look to the reason of it, and not only whether the case to which we are asked to apply it comes within the language the Judges use when they lay it down. You must always bear in mind, what I think is sometimes forgotten in argument, that when you are dealing with language used by Judges you must consider their expressions in connection with the case before them; you are not to take, as laying down a general proposition, language which in most cases was intended to apply only to the

(*i*) I. B. & Ad. 696.

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particular case before the court. I cannot see that this case comes within the reason of the rule that has been applied to it. I think the learned Judge of the Small Cause Court has come to a wrong decision, and that the plaintiffs are entitled to recover the amount they claim. Judgment will therefore be given for the plaintiffs with costs, including the costs of reserving this case.

BAYLEY, J.:—I concur in the opinion just pronounced by the Chief Justice. The decisions on which the Judge of the Small Cause Court appears to have grounded his decision were of a different character from the present case. In *Jones* v. *Ryde*, where it was held that a person who discounted a forged navy bill for another, who passed it to him without knowledge of the forgery, might recover the money back, as had and received to his use, upon failure of the consideration, in the course of delivering his judgment, GIBBS, C.J., said: "A case somewhat similar very frequently occurs in practice, on which I should not rely as governing the law but that it is said by my brother Lens to be sanctioned on the authority of a case so decided at Nisi Prius by Mansfield, C.J., namely, where forged bank-notes are taken. The party negotiating them is not, and does not profess to be, answerable that the Bank of England shall pay the notes, but he is answerable for the bills being such as they purport to be." And that appears to be so, for in giving the judgment of the Court of Queen's Bench in *Woodland* v. *Fear* Lord Campbell says, "The bank did not pay the cheque as his bankers or on his credit; and if so they must have paid it on the credit of the defendant as much as if they had given him change for a banknote, both parties believing it to be genuine; in which case, if it turned out to be forged and worthless, an action might clearly be maintained to recover back the money advanced."

Now, here there was no payment at all. What was delivered in payment, and believed to have been genuine, turns out to have been forged, and so there is no answer to the action.

With reference to the necessity of giving notice in a case like this, I entirely concur with the Chief Justice in what has fallen from him on that point.

Judgment was ordered to be entered for the plaintiffs, with costs of suit and the costs of reserving the case, and consequent thereon.

Attorneys for the plaintiffs: *Manisty and Hurrell.*
Attorneys for the defendant: *Rimington, Hore, and Langley.*

Appeal Suit No. 162.

Jan. 14.

RUSTAMJI ARDESIR DA'VAR .....*Appellant.*
RATANJI RUSTAMJI WA'DIA' .....*Respondent.*

Promissory Note payable on Demand—Consideration—Interest.

A promissory note, payable on demand, given for interest due on a mortgage-deed, with interest on such interest, cannot be enforced by suit, there being no consideration for the making of such a note.

APPEAL from the decision of SARGENT, J.

The original suit (No. 414 of 1869) was brought to recover Rs. 2,055, with interest thereon at the rate of four per cent. per mensem, from the 22nd of April 1869 until payment, due on a promissory note in the usual form.

"Bombay, 22nd April 1869.

"On demand, I promise to pay to Rustamji Ardesir Dávar or order the sum of Rs. 2,055, say Rupees two thousand and fifty-five, for value received, with interest at the rate of 4 per cent., say four per cent., per month.

"Rs. 2,055.

(Signed) "RATANJI RUSTAMJI WA'DIA'."

The case came on for hearing on the 10th of August 1869. The plaintiff was called and said "I know the defendant. The signature to the note shown me is his. No money was paid at the time, but there was interest due to me on a mortgage-deed, the amount of which had been settled between us." No other evidence was given.

The defendant did not appear.

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On the 17th of August judgment was given for the defendant.

The appeal was argued before COUCH, C.J., and BAYLEY, J., on the 7th of January 1870.

Macpherson (with him *Badruddín Tyabji*) for the appellant:—The plaintiff is entitled to recover on this note. It must have been given either *in accord and satisfaction*, or *for and on account*, of the pre-existing cause of action.

If the note was given *in accord and satisfaction of* the interest due on the mortgage, then there was consideration: *Sibree* v. *Tripp* (*a*). If the note was given *for and on account of* the interest due on the mortgage, then (*a*) as to the principal sum of Rs. 2,055 the note only expresses what the law implies, viz., a promise to pay the sum admitted to be due on demand;—and (*b*) as to the promise to pay interest, that would be supported by the same consideration: *Earle* v. *Oliver* (*b*). Besides, forbearance in itself is consideration for a promise to pay interest, and here some forbearance must be presumed to have been intended: *Alliance Bank* v. *Broom* (*c*).

Atkinson, Serjt., and *Farran*, for the respondent:—There was no consideration for the note. When the amount of interest due on the mortgage was calculated, the law implied a promise to pay that amount on demand, and that consideration being executed will only support the promise that the law then implied: *Roscorla* v. *Thomas* (*d*), *Emmens* v. *Elderton* (*e*). The promissory note contains a promise to do something more, viz., to pay that amount on demand with interest. For this there is no consideration. From "Byles on Bills" it seems doubtful whether the promissory note would be good even for the principal; but it is not necessary to go to that extent. The *Alliance Bank* v. *Broom* is distinguishable from this case. There the Vice-Chancellor came to the conclusion that there must be presumed to have

(*a*) 15 M. & W. 23. (*b*) 2 Exch. 71. (*c*) 34 L. J. Ch. 256.
(*d*) 3 Q. B. 234. (*e*) 4 Ho. Lo. Ca. 624; S. C. 13 C. B. 495; 6 C. B. 160.

been an intention to give time. That cannot be presumed here, for the note on its face is payable on demand. In *Earl* v. *Oliver* the agreement was undoubtedly good for the principal sum.

There is no evidence here to show that the note was given by way of accord and satisfaction; the contrary, therefore, will be presumed.

Macpherson in reply.

Cur. adv. vult.

14 Jan. 1870. COUCH, C.J.:—In this case, there being a sum of money due from the defendant to the plaintiff upon a mortgage-deed for interest, the defendant gave to the plaintiff a promissory note for the amount, payable on demand, with interest at the rate of four per cent. per month; and the suit is brought upon the note for the principal sum and interest from the date of it. Now if the note had been payable at a future day, there would be evidence of an agreement to suspend the remedy for the existing debt until the note was due, which would be a sufficient consideration for it: *Baker* v. *Walker* (*f*). Here, the note being payable on demand, there is not merely no evidence of such an agreement, but the note itself imports the contrary. Before he made the note the defendant was liable to pay the money on demand, and so he continued to be. Nothing was done, or promised to be done, by the plaintiff; and, in the language of the Civil Law, the obligation is null, being without any cause.

It was argued by Mr. Macpherson, for the plaintiff, that the promise to pay the interest was a distinct contract, and that the forbearance which followed the giving of the note was a sufficient consideration for that, and he relied upon the case of *The Alliance Bank* v. *Broom* (*g*). But I think this cannot be treated as a separate contract. The promise in the note is to pay Rs. 2,055 with interest. The interest is to

(*f*) 11 M. & W. 465. (*g*) 34 Law J. Ch. 256.

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be paid as an accessary to the principal, and if the note is void as to the principal sum it must, I think, be so as to the interest also. On this ground the present case is, in my opinion, distinguishable from *The Alliance Bank* v. *Broom*. The claim in the plaint being founded on the note only, the plaintiff is not entitled to recover the interest on the mortgage in this suit, and the judgment of the Division Court for the defendant must be confirmed with costs.

BAYLEY, J., concurred.

Decree confirmed with costs.

Attorney for the plaintiff: *Shámráv Pánḍurang.*

Attorney for the defendant: *Pestanji Dinshá.*

Referred Case.

Jan. 14.

YESOBA' DA'MODHAR .....*Plaintiff.*
SECRETARY OF STATE FOR INDIA IN COUNCIL. *Defendant.*

Land required for public purposes—Compensation to person deemed to be in possession—Real Owner, Suit by—Act VI. of 1857, *Secs.* 5, 7, 27, *and* 29.

A Collector who, after making proper inquiries, pays compensation-money for land taken under Act VI. of 1857 to the person "deemed by him to be in possession as owner" (the amount of such compensation having been settled under Sec. 5) is not liable to be sued by the real owner of such land for the amount of such compensation-money.

It is in the discretion of the Collector whether he will take advantage of the provisions of Sec. 29 or not.

CASE stated for the opinion of the High Court by N. Spencer, Third Judge of the Bombay Court of Small Causes, under Sec. 55 of Act IX. of 1850:—

"This action is brought by the plaintiff to recover compensation for 313 square yards of land, of which he alleges he is the rightful owner, and which have been taken possession of by Government, under the powers given to them by the "Act for the Acquisition of Land for Public Purposes" (No VI. of 1857).

"The summons was originally issued against the Collector of Bombay, but, at the request of the plaintiff's attorney, I amended it by making the Secretary of State for India the defendant.

"On the case being called on for hearing, the Government Solicitor, who appeared for the defendant, admitted the plaintiff's title to 202 square yards of land, and his right to compensation for that quantity, which had been awarded and tendered to him. As to the residue of the land, namely, 111 square yards, it was stated that conflicting claims were made by the plaintiff and one Tukárám Hiráji; that the Collector, under Sec. 7 of the Act above referred to, decided that Tukárám was the person in possession of the land, made an award in his favour, and paid him the compensation for that portion.

"Under these circumstances it was contended by Mr. Hearn that no action would lie either against the Secretary of State, or the Collector of Bombay as his representative, by the person claiming to be the rightful owner of the land, to recover compensation for the same. It was argued that the Collector, having decided, under Sec. 7 of Act VI. of 1857, that Tukárám was the person in possession of the land as owner, and having proceeded, under Sec. 5, to make an award in his favour, was bound, under Sec. 28, to pay him the compensation awarded; that the defendant thereafter was absolved from all liability to the person claiming to be the rightful owner, and that the remedy of the latter was against Tukárám.

"I was of opinion that the power given to the Collector to decide who was the person in possession was 'for the purpose only of taking such measures as may be necessary for fixing the value of the land and the amount of compensation for the same'; that his subsequent award in favour of Tukárám, and payment of compensation to him, were no bar to the plaintiff instituting an action in this court, which has jurisdiction in respect of the land, against the defendant, by whom he alleges that he has been dispossessed, to establish his title to the land, and right to be compensated for the same.

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"At the request of the Government Solicitor I have consented to state a case for the opinion of the High Court, and I now solicit the decision of their Lordships on the following question:—

"Can the plaintiff, under the circumstances above set forth, sue the defendant in the Court of Small Causes to establish his title to the land of which he alleges he has been dispossessed, and his right to compensation?

"I may add that the amount of compensation claimed by the plaintiff is that which the Collector awarded by agreement with Tukárám."

The case was argued before COUCH, C.J., and SARGENT, J., on the 7th of October 1869.

Farran and *Bálá Mangesh Wágle* for the plaintiff.

The Honorable *J. S. White* (Advocate General) (with him *Green*) for the defendant.

Cur. adv. vult.

14th January 1870. COUCH, C. J. (after briefly stating the facts of the case, and the question for decision, proceeded):—The decision of that question depends upon the construction to be put on the provisions of the Act (VI. of 1857). That Act, which is an Act "to make better provision for the acquisition of land needed for public purposes, and for the determination of the amount of compensation to be made for the same," contains a provision in Sec. 4 that the Collector "shall cause the land to be marked out and measured, and a plan to be made of it; after the land has been marked out and measured, he shall give public notice that the land is about to be taken for a public purpose; and shall also give notice to the same effect to the occupier (if any) of such land, and to all persons known or believed to be interested therein, or to be entitled to act for persons so interested, as shall reside or have agents within the collectorate in which the land is situate. Such notice shall contain a citation calling on all persons interested in the land to appear and state the nature of their interests in the land, and the amount and particulars of their claims to compensation for

the same." Then Sec. 5 provides that the Collector "shall proceed to inquire summarily into the value of the land and the amount of compensation to be awarded; and, if the Collector and all the persons interested agree as to the amount of compensation to be allowed, shall make an award for the same; and if the said persons agree also in the apportionment of the compensation such apportionment shall be specified in the award. The award shall be final and conclusive in regard to the value of the land, and the amount of compensation for the same." These provisions are material with reference to subsequent sections. Then the Act, by Sec. 6, provides in the case of there being no claimant, and when the Collector and persons interested are unable to agree as to the amount of compensation, for a reference to arbitration; and then comes Sec. 7, upon the language of which the Judge of the Small Cause Court mainly founded the conclusion to which he came in favour of the plaintiff:—"If upon the said inquiry any question arise respecting the title to the land between two or more persons making conflicting claims in respect thereof, the person deemed by the Collector to be in possession as owner, or in receipt of the rents as being entitled thereto, shall, for the purpose *only* of taking such measures as may be necessary for fixing the value of the land and the amount of compensation to be allowed for the same, be held, as between such persons, to be the person interested in the land." The words of the section are "the person deemed to be in possession shall, for the purpose *only*." The introduction of the word "only" causes some difficulty in the construction of the Act, and the Judge of the Small Cause Court seems to have considered that it operated in such a way as to exclude the payment of the compensation.

Now, I think, in considering what is the meaning of this portion of the section, it is material to consider where the provision occurs. It is part of a series of provisions devoted to the ascertainment of the amount of compensation to be given, and I think full effect is given to it if we consider it was introduced to show that the decision of the Collector as to the

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person in possession was not to have any effect on the rights of persons making conflicting claims, or any other persons; and that the title to the land, or to the compensation which would be substituted for it, should be determined as if he had made no decision. The provision was introduced cautiously, in order that the power might not be supposed to extend beyond the ascertaining who was in possession.

Then follow a variety of provisions providing for a reference to arbitration when there is a dispute as to the compensation to be awarded; and then we have Sec. 27, which deals with a new subject-matter.

The amount of compensation having been ascertained by agreement with the Collector, Sec. 27 provides what is to be done :—"When the amount of compensation to be paid for land taken under the provisions of this Act is determined by the award of the Collector, under Sec. 5, he shall pay the amount awarded at the time when possession is taken of the land on account of Government." In the case of an arbitration, possession is taken before the award is made, and in that case "when the compensation is determined by the award of arbitrators under Sec. 20, the Collector shall pay the amount awarded, with interest from the time when possession was taken." It is to be observed that this section requires compensation to be paid when possession is taken, but it is silent as to the person to whom it is to be paid. It must be, therefore, considered that compensation is to be paid to the persons interested in the land, and there is no reason for excluding from its operation the person who is deemed by the Collector to be in possession as owner, and as such held to be the person interested in the land.

It is to be presumed that the Collector will do his duty and make proper inquiries as to who is in possession as owner, and, if he has made an inquiry properly and fairly, there is no reason why the person deemed to be in possession as owner should not be dealt with, for the purpose of paying the compensation-money to him, in the same manner as he is dealt with for the purposes of Sec. 7.

This view of the intention of the Legislature is confirmed by a consideration of the somewhat similar provisions of the English Act, which the Legislature here had probably in mind when framing the present Act. Sec. 79 of the Land Clauses Act, 8 & 9 Vict., c. xviii., enacts "that if any question arise respecting the title to the lands in respect whereof such money shall have been paid or deposited, the parties respectively in possession of such lands, as being the owners thereof, or in receipt of the rent of such lands, as being entitled thereto, at the time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands until the contrary be shown to the satisfaction of the Court; and, unless the contrary be shown as aforesaid, the parties so in possession, and all parties claiming under them, or consistently with their possession, shall be deemed entitled to the money deposited, and the same shall be paid accordingly." There the Imperial Legislature has given this effect to the fact of possession, that the person in possession is considered as *primâ facie* entitled to receive the compensation-money. The money awarded is to be paid to him. That does not conclude the rights of other parties, but it protects the persons who pay the compensation, and enables them to take the land. The great object is that the land may be taken possession of upon proper compensation being paid for it, and, as far as it can be done, to the right person, but no other burden is thrown upon the Collector or other officer than that. This construction of the section is consistent with the provisions in subsequent sections, for Sec. 28 proceeds: "Except as provided in the next following section, payment of the compensation shall be made according to the award to the persons named therein." That would apply to a case where compensation has been awarded and where the persons interested are named in the award. The Legislature is always careful "that nothing in this Act contained shall affect the liability of any person who may receive the compensation awarded for any land, or any portion of such compensation, to pay the same to the person lawfully entitled thereto." The rights of other persons are carefully

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protected, and, although the Collector is discharged by paying the person named in the award, that person on receiving the money is liable to pay it to the person lawfully entitled.

Then Sec. 29 provides that "if there exist any ground which, in the judgment of the Collector, renders it improper to make immediate payment of the compensation to any of the persons having or claiming any interest in the land, or in the compensation awarded in respect thereof, the amount shall be invested in Government securities and held in deposit until an order of court shall be obtained for the payment thereof." Now, that is a provision which leaves it in the discretion of the Collector whether he will pay the compensation-money to the person in possession or named in the award, or leave the question who is entitled to it to be settled by the court; for it may well be that though the Collector would come to the conclusion that a certain person sufficiently represented the owner to settle the compensation, yet that cases would arise of conflicting claims where he would deem it right to refer it to the court to decide the other questions between such parties, and to place the moneys in the mean time under the control of the court. In my opinion the section has no further effect than that.

In this case there is nothing to show that the Collector was not justified in paying the money to Tukárám, and the plaintiff is not entitled to maintain this action. I may add that Sir Charles Sargent has considered this judgment with me, and concurs in it, and what I have said must be regarded as our joint judgment. The reply to the question of the Judge of the Small Cause Court will be that the plaintiff is not entitled to maintain this action. There must be judgment for the defendant with costs of suit, together with the costs of reserving this question for the opinion of this court and consequent thereon.

Order accordingly.

Attorney for the plaintiff: *Pestanji Dinshá.*

Attorney for the defendant: *R. V. Hearn,* Government Solicitor.

Referred Case.

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Jan. 15.

HA'KMA' MA'NJI *et al.* .....*Plaintiffs.*
MEMAN AYAB HA'JI *et al.* .....*Defendants.*

Hindú Law—Interest—Act XXVIII. of 1855.

Act XXVIII. of 1855 does not affect, or supersede the rules of, the Hindú law as to interest.

A promissory note, payable two months after date, given for money lent and interest in advance at the rate of 12½ per cent. per mensem, contained an agreement to continue to pay that rate of interest after the due date if the money was not then repaid.

Held that the high rate of interest so agreed to be paid did not constitute a penalty, against which the courts could relieve.

CASE stated for the opinion of the High Court by the Full Court of the Bombay Court of Small Causes, under Sec. 55 of Act IX. of 1850 :—

"This action is brought to recover Rs. 258-2-0, being interest for seven months, at the rate of 12½ per cent. per month, on a promissory note for Rs. 295 made by the defendants on the 30th of November 1868.

"On behalf of the defendants, it was contended, before the Third Judge of the court, that the object of the agreement to pay so high a rate of interest as 12½ per cent. per month was to secure the repayment of the principal sum at the stipulated time; that the agreement was, therefore, in the nature of a penalty, from which the defendants ought to be relieved on payment of interest at the rate of 9 per cent. per annum.

"The amount for which the note has been taken includes interest charged in advance at the agreed rate of 12½ per cent. for the two months that the note has to run.

"The Third Judge was of opinion that the high rate of interest stipulated for was not a penalty, and that the court could not relieve the defendants from paying it, and gave a verdict for the plaintiffs for the full amount claimed.

"The Full Court, however, to which an application was made on behalf of the defendants, considered that this case

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fell within the principle laid down by the High Court in the cases of *Rásáji Davláji* v. *Syáná Sagdú* (*a*) and *Motoji Rátnáji* v. *Shekh Húsen* (*b*), and, subject to the opinion of that court on the following question, reduced the verdict to Rs. 15-5-2, equivalent to interest at the rate of 9 per cent. per annum.

"The opinion of the Judges of the High Court is now solicited on the following question:—

"Is the agreement, in the promissory note, to pay interest at the rate of 12½ per cent. per month after the expiration of the two months allowed for the repayment of the principal, a penalty from which the defendants can be relieved?"

The promissory note was in the following form:—

"To Márvádi Hakmá Mánji (and) Devchand Girdhári, written by Meman Háji Ayab Hajayáni and Shá Ghellá Khemji, to wit: We two individuals together have received from you on loan, to wit, Rupees two hundred and ninety-five in full, in cash; (we have) received (the same) on personal security; the same are to be duly paid; to be duly paid at home or abroad; to be duly paid whenever the owners (or creditors) may demand; the time (for repayment) of these rupees is (fixed at) two months. If we retain (the money) beyond that (time), interest is to accrue at the rate of 12½ per one hundred per month, (in figures) twelve and a half per cent. per month; the same is to be paid; the interest is to be paid month by month. The Rs. 295 of this note are to be duly paid in cash on personal security. If we shall raise any objection to this note, we shall truly lose our own true religious faith. This writing is agreed to by, and binding on, us and our heirs and executors. The 1st of Magshar Vadya of Samvat 1925, the day of the week Monday, the 30th day of November 1868.

(Here the signature.)

Mirzá Ayab Haji, his signature is in his own handwriting; Rs. 295 have been received in cash on fixing the time of two months. Interest has been paid up to the fixed time, after that (time) interest is to accrue. It is duly to accrue agreeably to what is written above. In the event of my keeping (the money) unpaid beyond the fixed time, interest is to be duly paid at 12½ per cent. per month. The same is to be duly paid per 1 cent., agreeably to what is written above. His own handwriting.

(Here the attestation.)

Márvádi Powa Javráji, his attestation to Rs. 295 in the presence of the parties.

(*a*) 6 Bom. H. C. Rep., A. C. J. 7. (*b*) Ibid. 8.

1½. Shá Ghella Khemji, his signature to Rs. 295, namely, two hundred and ninety-five, agreeably to what is written above. The time of two months has been fixed. In the event of my keeping the money beyond the two months, interest is to be duly paid at 12½ per cent. per month. His own hand writing."

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There was no appearance for either party.

The case was considered by COUCH, C.J., and WESTROPP, J., and on the 15th of January the following judgment was given by

COUCH, C.J.:—In this case the agreement is only that if the money is not paid at the end of the two months, interest at the same rate as was paid for the two months shall continue to be paid. It is not an agreement for increased interest on default in payment, as it was in the cases referred to. The doctrine does not apply to such a case as the present, and the interest cannot be treated as a penalty from which the defendant can be relieved.

But Act XXVIII. of 1855 does not affect the Hindú law as to interest: *Khushálchand Lálchand* v. *Ibráhim Fakír* (*c*), *Ram Lall Mookerjee* v. *Haran Chunder* (*d*). This court must, therefore, remit the case to the Small Cause Court for a new trial, in order to determine whether the rate of interest claimed does not exceed what the plaintiff is allowed to take by Hindú law, which is very fully stated in the judgment of Sir Barnes Peacock in the case above quoted, and to decide the case accordingly.

The costs of reserving the question now decided are to be paid by the defendants.

(*c*) 3 Bom. H. C. Rep., A. C. J. 23.
(*d*) 12 Calc. W. Rep., App. from Or. Jur. 9.

1870.
Jan. 20.

Suit No. 219 *of* 1870.

DA'DA'BHA'I NASARVA'NJI .....*Plaintiff.*
MA'NIKJH SHA'PURJI KA'KA' .....*Defendant.*

Insolvent Trader—Order of Discharge—Debts not specified in Schedule—Indian Insolvent Debtors' Act—11 & 12 *Vict.*, c. 21, *s.* 60.

The order of discharge of an insolvent trader, under Sec. 60 of the Indian Insolvent Debtors' Act, operates to discharge such trader from all debts that could be proved in the matter of his insolvency, whether they are specified in his schedule or not.

THE plaint in this case stated that the plaintiff, on the 1st of December 1864, agreed to purchase a house from the defendant for Rs. 70,000, and on the 22nd of that month and year paid Rs. 15,000 in part payment; that subsequently, in May 1865, it was agreed between the plaintiff and defendant that the plaintiff should resell to the defendant the said house at the original price, and that the defendant should pay back to the plaintiff the Rs. 15,000 which had been so paid as aforesaid; and that the defendant paid Rs. 3,000 on account to the plaintiff on the 12th of May 1866. The suit was brought to recover the balance of Rs. 12,000, with interest, from the defendant.

The plaintiff also claimed Rs. 2,092, being his share in the profits of a consignment of cotton shipped by him and the defendant and one Mehervánji Nasarvánji in June 1862, in the name of the son of the defendant; the profits upon which the defendant had received.

The defendant in his written statement alleged that "before the commencement of the suit and after the dates respectively of all the transactions in the plaint mentioned, the defendant, being a trader within the meaning of the bankruptcy laws, became insolvent, and applied for the benefit of the Act to consolidate and amend the laws relating to Insolvent Debtors in India (11 & 12 Vict., c. 21), by petition filed the 20th of August 1866, and by an order of the same court on the 1st of February 1869, made under the 60th section of the same Act, the said defendant was declared

entitled to a discharge in the nature of a certificate under the provisions of the said Act, and was discharged from all liability in respect of the debts or claims established, or which might by law be proved, in the same court in the matter of his insolvency from the date of his filing his said petition."

He further alleged that the plaintiff had had full knowledge of the proceedings in the matter of the petition.

The suit came on for hearing before BAYLEY, J., on the 16th of January 1870.

Atkinson, Serjt., and *Green* for the plaintiff.

McCulloch and *Latham* for the defendant.

An issue was raised "whether the plaintiff was bound, in respect of the causes of action in the plaint mentioned, by the order of discharge in the written statement referred to."

It was admitted (1) that the plaintiff had knowledge of the proceedings in the insolvency of the defendant; (2) that no official notices were sent to him as a creditor; (3) that neither of the claims arising out of the causes of action in the plaint mentioned was included in the schedule of the defendant.

The ordering part of the certificate of the 1st of February 1869 was as follows:—

"This Court doth order and adjudge that the said insolvent, being a trader within the meaning of the bankrupt laws, be, and he is hereby declared, entitled to a discharge in the nature of a certificate, under the provisions of the Act relating to insolvent debtors in India; and he is hereby discharged from all liability in respect of the debts or claims established, or which might by law be proved, in this court in the matter of his insolvency, from the date of the filing of his petition for the benefit of the provisions of the said Act."

Cur. adv. vult.

January 20. BAYLEY, J.:—The preliminary issue which has been raised will, if found for the defendant, put an end

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to the present suit as to both the sums claimed. That issue was raised upon the written statement of the defendant, which set up that on the 1st of February 1869 the defendant had obtained a discharge under Sec. 60 of the Indian Insolvent Debtors' Act, and it was raised for the purpose of determining the effect of such discharge upon the present claims of the plaintiff.

The question mainly turns on the words of the order of discharge, which was hardly, at least not seriously, contended to have gone beyond the provisions of the statute. [His Lordship read the order.]

It was argued by counsel for the plaintiff that the provisions of the statute itself were such as to limit the discharge of the defendant to the debts specified in his schedule. The language of Sec. 60, taken in its ordinary meaning, does not warrant that construction, but it was said that the words of the proviso at the beginning of the section, "provided he shall have filed his schedule," apply to the latter part of the section.

It was also argued that the plaintiff had elected not to come in under the insolvency, and that he was not, therefore, affected by the order of discharge. I consider there is no ground for this contention. It was admitted that the plaintiff knew of the proceedings in the matter of the insolvency of the defendant, though he had no official notice of them; and also that his present claims were not specified in the schedule of the defendant.

Now if this had taken place in the Court of Bankruptcy in England the discharge of the defendant in that court would have affected the claim in question. The form of plea given in Bullen and Leake's Precedents of Pleadings, p. 505 (edition of 1868) sufficiently shows that this is so:— "That he became bankrupt within the meaning of the statutes in force concerning bankrupts, and that the causes of action in the declaration mentioned accrued before the defendant so became bankrupt." On the language of Sec. 60, there appears to me to be no doubt that an order of dis-

charge under it has a similar effect, more especially when it is compared with Sec. 47, under which discharges are commonly granted, and I think that the mere non-insertion of debts in the schedule does not prevent the certificate barring such debts. In a recent case, that came before him in chambers, Sir Charles Sargent put that construction on Sec. 60. But the point is, I consider, conclusively determined by a case, not cited at the bar, of *Re Warwick and Worcester Railway Co. ex parte Parbury* (*a*), which was a decision of Lord Campbell, then Lord Chancellor, and the Lords Justices, upon the effect of an order absolute of the Insolvent Court at Calcutta granted under the Indian Insolvent Act 11 & 12 Vict., c. 21, s. 60.

Lord Campbell says, in the course of his judgment (p. 87): "What I rely upon is that the statute does not make the specification of the debt or liability a condition precedent to a discharge from the debt or liability; and it is quite clear that, according to the Indian Insolvent Act, there are debts not specified in the schedule from which, by virtue of the absolute order, the insolvent is discharged."

The Lord Justice Turner says (p. 89): "This question mainly depends, as it seems to me, upon the operation of the order absolute under the Indian Insolvent Act. Having attentively considered that Act, I have come to the conclusion that the order absolute under that Act was meant to discharge, and does discharge, the insolvent from all demands which would be discharged by a certificate under a fiat in bankruptcy of even date with the insolvent's petition. It is in terms so enacted by the 60th section of the Act, and I can find nothing in the context of the Act which can control that enactment. This section indeed refers in the early part of it to the schedule which the insolvent is required to file; but it seems to me to be clear that the discharge was not intended to be confined to the debts enumerated in the schedule: for throughout the Act continual reference is made to debts not included in the schedule, and such debts are treated as standing on the same footing as debts admitted by

(*a*) 3 De Gex F. & Jones 80; S. C. 30 L. J. Ch. 513.

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the schedule. Assuming, then, that the discharge was not intended to be limited to the debts in the schedule, was it intended to be limited to those debts, and to such other debts as might, to use the language of the Act, be established under the insolvency? I see nothing in the Act which can warrant this construction, and, on the contrary, I think there is much to be found in it which is unfavourable to such a limit, and favourable to a general discharge having been intended" (p. 90).

The Court held (Lord Justice Knight Bruce doubting) that the omission in the schedule did not prevent the insolvent's discharge from having the same effect as a bankruptcy certificate in England.

The defence set up does not come upon the plaintiff by surprise. It was alluded to in a letter sent to the plaintiff, dated the 24th of March 1869, and the plaint was filed, notwithstanding, on the 10th of April following. I find the issue raised in favour of the defendant, and there must be a decree for him with costs.

Decree for defendant with costs.

Attorney for the plaintiff: *C. Tyabji.*

Attorneys for the defendant: *Acland, Prentis, and Bishop.*

Suit No. 486 *of* 1869.

1870.
March 28.

RUJA'BA'I *et al.* ..... *Plaintiffs.*
ISMA'I'L AHMED, KHATIZA'BA'I, and FA'TMA'-BA'I ..... *Defendants.*

Muhammadan Law—Gift—Nominal Consideration—Construction—Joint Gift without discrimination of Shares—Gift to person standing in fiduciary relation to donor.

Where a conveyance between Muhammadans, though in form a deed of sale, is in reality a gift, its validity should be tested by the rules of law applicable to gifts, and not by those applicable to deeds of sale.

In determining whether a transaction is one of sale or gift the intention of the parties, rather than the form of the instrument used, should be considered.

A deed of gift, in English form, of a house to three persons as joint tenants (without discrimination of shares) is good according to Muhammadan law, as it shows an intention on the part of the donor to give the property in the *whole* house to each of the donees.

A gift by a Muhammadan in Bombay which contravenes the principles of English courts of equity with regard to gifts to persons standing in a fiduciary relation to the donors will not be upheld.

Where a Muhammadan lady conveyed to her confidential adviser and two other persons the house in which she dwelt by deed of gift which (though read over and explained to her by a clerk who acted both for the donees and her) was executed by the lady without independent professional advice, and without the advice of the heads of her caste, *it was decreed*, at the instance of her heirs after her death, that the deed should be set aside.

THE plaint in this case stated that one Rassubái, the widow of Dáud Káji bin Muhammad Káji, was possessed of a certain house in Gulám Modini Street; that on the 19th of November 1865, Rassubái appointed Ismáíl Ahmed Munshi, the first defendant, her attorney, to collect her rents and manage for her all matters of business, and to advise her confidentially, and that he so acted up to the time of her death. That during the time he so acted, on the 2nd of June 1868, he induced Rassubái to execute a conveyance of her house in Gulám Modini Street to the three defendants for a nominal sum of Rs. 10. The second defendant was the infant daughter of the first defendant, and the third defendant was the female servant of Rassubái in her life-time. Rassubái did not, on executing the conveyance, give

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up possession of the house, nor did she do so before her death. Rassubái died intestate in May 1869, leaving the plaintiffs her heirs.

It was prayed that the gift of the house should be declared void, and the deed given up to be cancelled; that the defendants should execute a reconveyance and give up the title-deeds of the house; and that they should be restrained from collecting the rents of it.

The defendants put in a written statement, in which they alleged that the house in Gulám Modini Street became their absolute property on the 2nd of June 1868, after which date Rassubái occupied the house not as owner, but as the tenant of the plaintiffs, under the terms of a Gujaráti lease; that Rassubái executed the deed of the 2nd of June of her own free will, and that she was not induced to do so by Ismáíl Ahmed Munshi; and that a valid gift of the premises, according to Muhammadan law, was made to them by Rassubái.

The case was heard before SARGENT, J., and was concluded on the 14th of February 1870.

Mayhew and *Starling* for the plaintiffs.

Scoble (Acting Advocate General) and *Green* for the defendants.

The issues raised were (1), whether there was a valid gift of the premises by Rassubái to the defendants according to Muhammadan law; (2), whether there was a valid sale of them according to the same law.

The deed of gift of the 2nd of June 1868 was an indenture in English form and language. It was thereby witnessed that "in consideration of the sum of Rs. 10 paid by the defendants to Rassubái, Rassubái gave and granted unto the defendants the house in question, to have and to hold the same, unto the said Ismáíl Ahmed Munshi, Khátizabái, and Fátmábái, their heirs, executors, administrators, and assigns for ever, *as joint tenants*." Then followed a covenant for further assurance. To the deed was affixed the mark of Rassubái, and it was attested by Henry S. Carter, an

English attorney, and his clerk, Pundlik Náráyan. The Gujaráti lease, referred to in the written statement, was as follows, addressed to the defendants:—"Written by Ashabái and Rassubái, the widows of Dáud Muhammad (to wit). We two persons jointly have taken by contract your house at the rate of Rs. 75 per mensem. The rent for the same is duly to accrue against us from the 3rd June 1868. This is duly written by the desire of both the báis." The marks of Rassubái and Ashabái were affixed to the instrument, which was not dated. This instrument, not being sufficiently stamped, though tendered, was not put in evidence.

How far Rassubái understood the nature of the deed of the 2nd of June 1868, and under what advice she acted when she executed it, will appear from the judgment of the Court.

Cur. adv. vult.

March 28. SARGENT, J.:—The plaintiffs in this suit, alleging that they are the heirs, according to Muhammadan law, of one Rassubái, widow, seek to set aside a deed of the 2nd of June 1868, by which the said Rassubái conveyed to the three defendants a piece of land and the house thereon, situated in Butcher Street, otherwise called Gulám Modini Street, and assessed by the Collector under No. 23, on the grounds—(1) that the consideration for the same was merely nominal and wholly inadequate, and that Rassubái was induced to execute the same by the defendant, Ismáil Ahmed Munshi, who at the time was her confidential adviser; and (2), that, treating the deed as a gift, it was invalid because neither were the defendants nor was either of them put into possession of the premises after the execution of the deed.

At the hearing, it was further contended that the deed was invalid as a gift of partible property to three persons without discrimination of their shares. [His Lordship stated the issues and proceeded.]

Now, it is not suggested by the defendants or by Ashabái, the sister of Rassubái, that the transaction between themselves and Rassubái was in substance anything else but a gift from the latter. It is said, however, that, as the deed in

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question is in terms a gift for a consideration, although that consideration is the nominal sum of Rs. 10, the transaction assumed the form and character of a sale, and was no longer subject to the incidents of a gift.

Now, it is clear that the Muhammadan law contemplates the case of mutual gifts or gifts for a consideration; and that they resemble contracts of sale (in the conditions essential to their validity), and not absolute gifts. This is clear from the passages cited from Sir William Macnaghten's "Principles of Muhammadan Law," Ch. V., para. 14, and Baillie's "Digest of Muhammadan Law," p. 122, where gifts for consideration, or Hiba-bil-Iwus, as they are termed, and their incidents, are fully discussed. In the present case, however, the consideration is a merely nominal one, and the transaction on the face of it a gift merely, even if we did not know from the admissions of the defendant himself and Ashabái, his principal witness, that such was the case. It is probable that the nominal consideration was merely introduced to comply with the customary form of an English deed. If this were not so, the necessary inference from the evidence is that it was introduced in order to disguise what was an absolute gift under the form of a sale. That would be a fraud upon the law, which requires certain conditions to be fulfilled to give validity to a gift. It may be asked, perhaps, what is the quantum of consideration which will make the transaction a gift. The proper answer, I conceive, is what is stated by the Lord Justice Turner in *Townend* v. *Toker* (*a*), discussing the analogous case of a voluntary settlement: "The Court does not enter into the quantum of consideration; in effect the question is whether the transaction was one of bargain or of gift merely."

This transaction must, therefore, notwithstanding its mere outward and visible form, be treated as a gift, and its validity tested by the rules applicable to such instruments.

In the case of *Ranee Roshun* v. *Rajah Syud* (*b*), cited by Mr. Mayhew, the court dealt with a similar deed in the

(*a*) Law Rep. I. Ch. App. 446. (*b*) 5 Calc. W. Rep., Civ. R. 5, 19.

same manner. It was there said by the court "we must look to the spirit of the contract, and not to the mere words of the same," and the court came to the conclusion on the evidence that the contract was merely a colourable attempt to conceal what was in substance a gift.

The first objection taken to the gift is that it is a gift of a house to three persons without discrimination of shares. In the Hedáyá, Vol. III., p. 298, it is said, "If one man make a gift of a house to two men the deed is invalid according to Hanifá. The two disciples hold it to be valid, because, as the donor gives the whole of the house to each of the two donees, there is consequently no mixture of property." Hanifá contends that the gift is a gift of half the house to each, as proved by the fact that if one man give to two men something incapable of division, and one of them accept the same, the gift becomes valid with respect to his share. The difference between Hanifá and his disciples would, therefore, seem to turn upon the construction of the gift. In the present case the gift is by an English deed to three persons as joint tenants, thus showing a clear intention on the part of the donor to give the property in the whole house to each of the donees.

It would appear from Baillie and Elberling that the opinion of the disciples has been generally adopted. However that may be, the particular form of this gift leaves, I think, no doubt that the objection cannot prevail in the present case.

I now pass to the second objection, that possession of the house was not given to the donees in the lifetime of Rassubái. It was not disputed that possession was necessary to give validity to the gift. And it is admitted by the defendants that Rassubái returned to the house from the solicitor's office immediately after the deed was executed, and continued to live there until her death. But the defendants say that, although this was the case, she gave them constructive possession of it, by accepting a lease of the house from the first defendant.

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An unstamped document, said to be the lease, was tendered in evidence. Its admission was resisted by the plaintiff, and on the defendants refusing to have it stamped and pay the penalty it was rejected. Strictly speaking, no other evidence was, I think, admissible to prove the fact of a lease having been executed. Oral evidence was, however, given without opposition on the part of the plaintiff. It is clear upon the evidence that nothing was said about a lease when the deed was executed. This is admitted by Ismáíl Ahmed. His reason is that at that time it was not intended that the ladies should remain in possession. This is contradicted by Ashabái, who says that when they went to the solicitor's office it was explained to Rassubái that she was to remain in the house during her life. It is inconsistent with the admitted fact of their returning to the house from the office, and is opposed to the probabilities of the case; for it is most improbable that Rassubái, who had lived so many years in this house, should in her old age have been willing to quit it, however much she may have been desirous that the defendants should have it at her death. The question, therefore, naturally suggests itself, "why was not the lease executed at the same time as the deed." The very peculiar form of the deed seems to me to suggest the answer. I can entertain little or no doubt that it was considered at the time that it was not necessary that possession should be taken by the donees, if the gift could be thrown into the form of a Hiba-bil-Iwus or virtually of a sale, and that the intention then was that Rassubái should continue in possession, and to enjoy the rents of the house during her life. If this were not so, why was this unusual form of gift adopted, and why was not the whole transaction completed at one and the same time? This is almost conclusive to my mind, that the idea of a lease (if there ever was one) was an afterthought, suggested probably by doubts as to the efficacy of the deed by itself. But if this were so, what reason can there be for thinking that Rassubái changed her mind and consented to give up her interest in the house during her life. Obviously none. Everything, therefore, points to this alleged lease (if there were one) having been a colourable lease. If, lastly, the evidence as to

the payment of the rent and its application be examined, it certainly does not favour the idea of a *bonâ fide* lease, but rather the contrary. (1) The house is said by Ashabái to have been rented by Rassubái and herself at Rs. 75 a month; and yet there is no evidence of more than Rs. 300 rent having been paid during almost one year under the alleged lease. (2) The municipal bills continued to be made out in the name of Rassubái up to the time of her death. (3) The first defendant says he paid the municipal taxes after the execution of the deed. But the evidence of the tax-collector shows that the municipal bills for the last half-year of 1868 were paid by Rassubái herself in July, and the first defendant, although he swore to the payment of the bills marked 4 and 6, which were paid in January and February 1869, was not even asked whether he paid the bill marked A. It is true that in the memo., from which he refreshed his memory, Rs. 60 are mentioned as having been paid for municipal bills before October, but he never swore to having paid them. (4) After the payment of the Rs. 300 was made by Rassubái, and not till then, do we find the defendant paying the municipal bills. (5) The gift and alleged lease appear to have been only known to the parties themselves, and the whole transaction was kept secret from relations and caste. On the whole of this evidence I can entertain no doubt that if there was a lease it was a colourable transaction, and that Rassubái was in possession of the house up to the time of her death.

It follows that, as possession by Muhammadan law is essential to give validity to a gift, the gift in question is void.

This is sufficient to decide the case; but I am of opinion that the plaintiff must also succeed on her last objection, namely, that the gift is void owing to the fiduciary relation subsisting between the first defendant and Rassubái. I shall assume for the moment that the gift was to the first defendant alone. It appears that the first defendant had been married to a daughter of Rassubái's sister, and that he had for five or six years—ever since the death of Rassubái's husband—acted as her man of business in the management of her property. She, and her co-widow, Ashabái, had executed

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to him a power of attorney, giving him the largest possible powers in all matters relating to their property. The first defendant says: "I received rents and made payments for her. Rassubái trusted me and took my advice in business matters. I had not considerable influence over her." It is clear, then, that he filled a position of a fiduciary character as regards Rassubái, and that a confidential relation was established between them.

Under those circumstances it is plain, if the principles which govern the Court of Chancery are to be applied—and I know no reason why they should not, being founded on considerations of equity, justice, and good conscience—that the gift could not be supported unless it could be shown to the satisfaction of the court that the parties were, notwithstanding the relation, substantially, as it is termed, at arm's length. What constitutes being at arm's length is stated by Lord Justice Turner in the case of *Rhodes* v. *Bate* (*c*). He says: "I take it to be a well established principle of this court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them."

Now, the first defendant's statement is that Rassubái first spoke to him about the gift; that she gave him some papers and told him to get a deed prepared. That he, accordingly, went alone to Mr. Carter's office and gave instructions to the Parbhu clerk. It appears from the evidence of Pandlik Náráyaṇ, the Parbhu clerk, that Mr. Carter's office had never been concerned for Rassubái; but that the first defendant had been one of their clients, and that he did not see Rassubái before the day of the execution of the deed. That on the occasion of executing the deed he explained it to Rassubái, and that Rassubái understood she was making a gift of her property. It is clear from this that Rassubái had no competent and independent professional advice. That she

(*c*) Law Rep. I., Ch. App. 257.

knew she was giving the house to the three defendants will be admitted, as was the case with the plaintiff in *Rhodes* v. *Bate*. But what evidence is there of independent professional advice to neutralise the influence which the law assumes, on grounds of public policy, to be the necessary result of the confidential relation? The most that can be said is that the defendant's solicitor acts for both, or rather, to state the matter more accurately (for Mr. Carter would appear to have been called in merely to attest the execution), the Parbhu clerk of the defendant's solicitor acts for both parties. The Parbhu clerk said it was usual to act for both parties. It is well that it should be clearly known that in transactions of this nature independent advice is required, and not that of the donee's solicitor, who for the nonce constitutes himself the donor's solicitor for the purpose of taking her execution, and, it may be, reading the deed to her. But if Rassubái had no independent professional advice, still less does she seem to have had the independent advice of her relations and caste-people. The only relations whom she saw, or who knew of the transaction, were Ashabái, who stood to the first defendant in the same sort of position as herself, and Khatizábái, a child of ten years old, and daughter of the first defendant, and Fátmábái, herself one of the donees and a person of inferior position in the house. It is plain, from the evidence of Ahmed Sulemán, the head-man of the community to which Rassubái belonged, that she never consulted her caste-people. Under these circumstances it would be impossible, consistently with the principles laid down in *Rhodes* v. *Bate*, to support the gift if made to the first defendant exclusively.

Can, then, any distinction be drawn in favour of the other two defendants, between whom and Rassubái there was no fiduciary relation? It is clear that if the benefit was obtained for them by the first defendant, it must have been tainted by the channel through which it passed. The case of *Huguenin* v. *Baseley* (*d*) is a distinct authority on this point. In the present case, however, it may be said that Rassubái may well have wished to benefit Khatizá and Fátmá,

(*d*) 14 Ves. 290.

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independently of any influence by the first defendant, and that the benefit did not pass, in the words of Lord C.J. Wilmot, through a polluted channel; the circumstance, however, of Khatizábái being the daughter of the first defendant and a girl of only ten years, the position of inferiority occupied by Fátmá, and the joint form of the gift, irresistibly lead to the conclusion that the entire gift was, in a considerable degree at least, due to the influence arising out of the fiduciary relation subsisting between the first defendant and Rassubái. I am of opinion, therefore, that the third objection is fatal to the entire gift.

Decree for the plaintiffs with costs.

Attorney for the plaintiffs: *Shámráv Pándurang.*
Attorney for the defendants: *Manisty and Hurrell.*

March 29.

Suit No. 596 *of* 1869.

JEA'UNISSA' LA'DLI BEGAM SA'HEB *et al.* ... *Plaintiffs.*
MA'NIKJI KHARSETJI..... *Defendant.*

Limitation—Promissory Note payable, after six months, on demand—Act XIV. of 1859, *Sec.* 1., *cl.* 16.

Where a promissory note was made payable "after six months, whenever the payee should demand the same," with interest, *it was held* that the law of limitation began to run upon the expiration of six months from the date of the note.

THIS suit was brought by the plaintiffs as administratrixes of the estate and effects of Mír Jáfar Alí Khán, to recover Rs. 3,982, balance due upon a Gujaráti promissory note. The translation of the note was as follows:—

"To Sardár Mir Jáfar Alí Khán Bahádur, written by Pársi Máníkji Kharsetji Shroff, to wit: Rs. 5,000 are credited to your account at my place as written below. The particulars thereof are as follows:—

Rs. 2,500, 25th May 1858.
„ 2,000, 18th September 1858.
„ 500, 3rd November 1858.

"According to these presents I have given receipts for these Rs. 5,000, bearing the above dates. Having cancelled them, I have given this receipt for the whole. Negotiations are going on with you as to my selling or

mortgaging to you my property at Byculla. If that matter be settled, this money is to be given credit for to you in that account. *Otherwise these Rs. 5,000 shall be truly repaid to you after six months, whenever you may demand the same, with interest at* 8 *annas per cent. per mensem.* (Dated) 23rd January 1859.

"Written by Mánikji Kharsetji Shroff, his own handwriting, his signature."

(An indorsement here followed in English) "Received from Mr. Kharsetji Rs. 2,500. The 20th November 1859.

(Signed) "JA'FAR ALI'."

No further payment than that indorsed on the note was made, nor was there any evidence given of a demand.

The plaint in the suit was filed on the 16th of October 1869, and the case came on for hearing before WESTROPP, J., on the 18th of January 1870.

Starling and *Badruddín Tyabji* for the plaintiffs.

Mayhew for the defendant.

The only issue was, whether the suit was barred by the Law of Limitation.

Cur. adv. vult.

29th March 1870. WESTROPP, J. (after reading the promissory note, said):—The only defence made is that this suit is barred by the Limitation Act (XIV. of 1859, Sec. 1., cl. 16). The sole issue, therefore, is whether the suit is barred by that Act.

For the plaintiffs it is contended that the Act would not begin to run against the note until after a demand had been made, and that no demand was proved to have been made, and *Carter* v. *Ring* (*a*) and *Thorpe* v. *Booth* (*b*) were relied on; but *Carter* v. *Ring* is not in point here. It was an action on a bond, not on a promissory note, and the bond was conditioned to be void on payment on demand; and, therefore, Lord Ellenborough held that express evidence of a demand was necessary in order to show a forfeiture, as there could not be a forfeiture until default of payment upon an actual demand. The plaintiff, as argued

(*a*) 3 Camp. 459. (*b*) Ryan & Mood 389.

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by Abbott for the defendant, was there seeking to recover the penalty, which is a collateral sum, and the cases with regard to payment of money on request, where there is an antecedent duty, and in which, therefore, the bringing of the action was considered a sufficient demand, did not apply. The decision in *Thorpe* v. *Booth* does not govern this case. There the promissory note was payable twenty-four months *after demand*, and it was held that the Statute of Limitations was no answer to an action upon that note, commenced within six years from the presentation for payment, *i.e.*, from the making of the demand. The demand was there necessary, in order to give a terminus whence the twenty-four months should run.

But in the present case the note is payable "after six months whenever you may demand the same." That is, the lapse of six months must precede the demand, and not as in *Thorpe* v. *Booth*, where the demand should have preceded the currency of the twenty-four months. Here the six months began to run from the date of the note; and, after that period had elapsed, the note was in the same position as any ordinary note payable on demand. In the case of ordinary notes payable on demand, the words "on demand" do not constitute a condition precedent, but merely import that the debt is due and payable immediately; and, therefore, on a bill or note payable on demand the Statute of Limitations has been held to run from the date of the instrument, and not from the time of the demand: *Christie* v. *Fonsick* (*c*): Byles on Bills, p. 320, 8th ed. This is so even where the note is made payable with interest, as here: *Norton* v. *Ellam* (*d*); and where a note payable on demand was given by a separate agreement as security for a banking account, it was held at *Nisi Prius*, by Baron Martin, that the Statute of Limitation ran from the day the note was given, and that the note was not kept alive by the banking account or payments made on that account: *Hartland* v. *Jukes* (*e*). Were it necessary to consider whether or not there has been a demand in this case, it may be that the payment by the defendant of

(*c*) Selwyn's N. P., p. 351, 9th ed. (*d*) 2 M. & W. 461. (*e*) 3 Fos. & F. 149.

Rs. 2,500 on the 20th of November 1859 might entitle the Court to presume a prior demand of payment, but, as there was not any legal necessity for a demand, I do not give any opinion as to whether the part-payment would warrant such a presumption. For the reasons already given, I think that this action is barred by the Limitation Act (XIV. of 1859, Sec. 1., cl. 16), and, therefore, that the issue must be found in the affirmative for the defendant.

But as it is not pretended that more than half of the amount of the note has been ever paid, and the only excuse put forward for not paying the remaining half and interest is the statement of the defendant's counsel, unsupported by any evidence given in this cause, that the defendant has, in some manner not disclosed, rendered himself useful to the late Jáfar Alí, and, therefore, that the latter did not intend to enforce the payment of the balance due on the note, I must, in making a decree for the defendant on the ground that this action is barred by the Limitation Act, decline to award him any costs.

Decree for the defendant without costs.

Attorney for the plaintiffs : *C. Tyabji.*
Attorney for the defendant: *Khanderáv Moroji.*

Appeal Suit No. 164.

April 7.

MULTA'NI MULCHAND CHUTUMAL *et al.* .....*Appellants.*
THAKAR SUNDARJI NA'RANJI .....*Respondent.*

Authority of Agent how proved—Insurance—Procedure—Nonsuit.

To prove the authority of an agent who underwrites a policy of insurance, it is not necessary, in order to charge his principal, that the instrument appointing such agent should be produced, if it is shown that he has been in the habit of underwriting policies for his principal, *and that the latter has been in the habit of paying losses upon policies so subscribed.*

Semble—When at the close of the plaintiffs' case the evidence adduced is not sufficient to connect the defendant with the instrument sued upon, the presiding Judge acts rightly in entering a decree for the defendant without hearing his evidence.

THIS was a suit brought on a policy of insurance, bearing date the 20th of March 1866, effected by the plaintiffs

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on their coasting vessel "Khaṭáv Pasá," for a voyage from Ghodábari to Bombay, and alleged to have been underwritten by the defendant for Rs. 2,000.

The case came on for hearing before SARGENT, J., on the 27th of November 1869. The first issue raised was whether the policy sued upon was underwritten by the defendants. The other issues are not material for the purpose of this report.

It appeared from the evidence that the defendant, at the date of the policy, carried on business by means of a *munim*, Jivan Ladhá, and that the policy in question was underwritten by Chápsi Jivan, the son of Jivan Ladhá. No written instrument authorising Chápsi to underwrite policies for the defendant was given in evidence, but the witnesses for the plaintiff (whose evidence on this point is given at length in the judgment of the Chief Justice) stated that Chápsi was in the habit of underwriting policies in the name of the defendant, but no further evidence of authority was given. The broker who negotiated the policy was not called, and, it was alleged, could not be found.

The plaintiffs put in evidence the following letter, written by the attorney of the defendant to the plaintiff:—

"To MULCHAND CHUTUMAL—I am instructed by my clients, Vassanji Ranandás, Sundarji Náranji, Mávji Prágji, and Dámodhar Karsandás, to state that they believe that the signatures of my clients were obtained this day by your broker on a policy of insurance of goods shipped by the native vessel Ganjá 'Khaṭáv Pasá,' from Ghodábari for Bombay, after you were in possession of some information of the loss of the vessel, as my clients received a letter this afternoon intimating the loss. I am to call upon you to return the policy to my clients by the bearer of this notice, otherwise such legal proceedings will be adopted against you as my clients may be advised, for the costs of which you will be held responsible. Dated this 20th day of March 1866.

"Yours truly,

(Signed) "VINA'YAKRA'V HARICHAND."

At the close of the case for the plaintiff, the learned Judge stopped the case, stating that the evidence given for the plaintiff of Chápsi's authority to negotiate for the defendant was not sufficient. He found the first issue for the defendant, and gave judgment for him with costs.

The plaintiffs appealed from this decision, and the appeal was argued before COUCH, C.J., and WESTROPP, J., on the 5th of March 1870.

Anstey and *Marriott*, for the appellants, contended—(I.) That there was sufficient evidence of authority, as Chápsi must be considered to have acted as the broker of the underwriter to sign the policy. (II.) That the evidence of authority, if not sufficient to have justified a decree for the plaintiffs, was sufficient to render it necessary for the defendant to rebut it. (III.) That the Judge had no power under the Code to enter what was substantially a nonsuit, as it was the right of the parties to have the whole evidence taken. [COUCH, C.J.:—The question is whether, on the evidence you gave, the Judge could not properly find for the defendants.] There was here an implied authority in Chápsi, which was sufficient: *Pickering* v. *Busk* (*a*).

The Honorable *A. R. Scoble* (Acting Advocate General) (with him *McCulloch*), for the respondent, contended that there was no evidence of authority, express or implied; that a mere scintilla of evidence did not necessarily call for counter-evidence on the part of the defendant: *Giblin* v. *McMullen* (*b*), *Maxted* v. *Paine* (*c*); that the course adopted by the learned Judge in the court below was correct.

Anstey in reply.

Cur. adv. vult.

7th April. COUCH, C.J.:—This was an appeal from a decision of Sir Charles Sargent, who made a decree in favour of the defendant. The suit was brought on a policy of marine insurance, and the first issue raised was whether the policy was underwritten by the defendant. The policy was alleged to have been made, by the defendant's

(*a*) 15 East, 38. (*b*) Law Rep. 2, P. C. Ca. 317, 339.
(*c*) Law Rep. 4, Ex. Ca. 81.

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authority, by Chápsi Jivan, and the question was whether he had authority from the defendant to sign it.

With regard to the law as to what evidence of authority should be adduced in such a case by the plaintiff, I cannot do better than refer to the valuable work of Sir Joseph Arnould, lately one of my colleagues on this bench. His work is one of great authority, and at page 199 (2nd ed.), where he deals with this subject, he says, "Agents may be appointed for the purpose not only of effecting sea policies for the assured but also of subscribing them for the underwriters. In this latter case they are generally authorised to act by power of attorney; but it is not requisite that such power should be produced at the trial if satisfactory evidence can be given of the agent's authority without its production. As to what shall be satisfactory evidence in the absence of the written authority is a point on which there has been some little fluctuation in the decisions. Thus, where a broker, called by the plaintiff to establish the defendant's subscription of the policies, proved that the defendant's name had been written under the policy by one Hutchins, who was in the constant habit of subscribing policies in the defendant's name, and had done several for the witness and for others to his knowledge, Lord Kenyon ruled that this was sufficient evidence to charge the defendant, without the production of the written authority under which he acted; but Lord Ellenborough in a later case held precisely similar evidence insufficient." Sir Joseph Arnould quotes *Courteen* v. *Touse* (*d*) as the case in which it was so decided, and adds in his note, "and rightly, see Duer, vol ii., p. 341, note *a*." In a case in 4 Campbell, p. 88, also cited by Sir Joseph Arnould (*e*), the note is that, in an action on a policy of insurance subscribed by the defendant's agent under a power of attorney, it is sufficient proof of the agency that the defendant is in the habit of paying losses upon policies so subscribed by the agent in his name, without producing the power of attorney.

Now, to apply this law to the case before us, let us see what

(*d*) 1 Camp. 43. (*e*) *Haughton* v. *Ewbank*.

the evidence is upon which the appellant relies, and whether it fulfils these requirements.

Megráj Dharamdás, the first witness who speaks to this point, says, "I am a broker, and know the defendant. I know his *munim*, Jivan Ladhá, and also his son, Chápsi Jivan. I know his handwriting. Of the policies shown me, three were signed by Chápsi in my presence. The policy sued upon was signed by him. I am a Multáni, and of the same caste as the plaintiff, and am employed by him as broker. I and my brother were the brokers employed in effecting this policy. We personally took part in the transaction, but I can't swear that I saw Chápsi Jivan sign it, but I recognise the signature as his. It is not in the handwriting of Jivan Ladhá. It is usual to have a *kachchá* policy first made out, upon which the *pakká* policy is afterwards prepared. I have known Chápsi sign *pakká* policies without receiving instructions from Jivan. I cannot give any instance in particular, there are so many policies; but I used to see Chápsi signing them without consulting Jivan. I know Chápsi used to sign. He is 15 or 16 years old now. I have known him four or five years. He was 11 or 12 when I first knew him."

Tájumal Nárandás, the only other witness who gives evidence as to the authority, says, "I carried on business in Bombay, in partnership with Manjatrám Manumal, during 1865-1866. I know the parties to this suit. I have known the defendant for twenty years. I have sometimes transacted business in Bombay with the defendant, through the agency of Chápsi Jivan. The nature of his business was writing and executing policies of insurance. I did not personally take part in effecting the insurance the subject of this suit. My partner, Manjatrám Manumal, may have procured the policy to be signed. Chápsi Jivan was 13 or 14 years old in 1865-1866. He was in the habit of signing policies, subject to the approval of Jivan Ladhá. I never knew of any instance of a policy signed by Chápsi Jivan being cancelled because it was disapproved by Jivan Ladhá. I cannot give any instances of Jivan Ladhá paying or otherwise ratifying policies of insurance signed by Chápsi Jivan

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in the defendant's name." That is all the oral evidence given for the plaintiff, and it falls short of what is necessary to show that Chápsi Jivan had authority to underwrite this policy. It is very much less than what was considered by Lord Ellenborough to be necessary in such cases, and what is stated by my brother Arnould to be required—his opinion being supported not only by English, but also by American, authority.

The appellant's counsel also relied upon the letter of the 20th of March, written by the attorney for the defendant on the day that the policy appears to have been underwritten, which, it was said, amounted to an admission of the authority of Chápsi Jivan to sign for the defendant. [His Lordship read the letter.] After considering its terms, I think that this letter cannot be construed as an admission of the authority of Chápsi Jivan. It is to be remembered that the writer of it is not writing merely on behalf of the defendant, but on behalf also of the other underwriters of the policy, with regard to whom this question does not arise, and in writing he is putting forward grounds of complaint that were common to all the underwriters. He wanted to give notice that the policy was not binding; and on that ground he seeks to have it returned. He had no right to have that done; but he, very properly, informed the assured of the facts which he alleged vitiated the policy.

As, then, there is not that amount of evidence as regards the authority of Chápsi which was sufficient for the Court to act upon, and as that deficiency is not supplied by the letter relied upon for the appellant, I think the conclusion at which the learned Judge arrived was right, and one at which I should myself have arrived if I had presided at the trial; and his judgment must, therefore, be affirmed.

WESTROPP, J.:—I fully concur, and cannot add anything with advantage to what the Chief Justice has said.

Decree confirmed with costs.

Attorneys for the appellants: *Dallas and Lynch.*

Attorney for the respondent: *J. Cleary.*

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March 25.

Suit No. 195 *of* 1869.

JIVANDA'S KESHAVJI.....*Plaintiff.*
FRA'MJI NA'NA'BHA'I .....*Defendant.*

Hindú Law—Equitable Mortgage—Deposit of Title-deeds—Merger of Verbal Agreement in subsequent Writing—Registration—Oral Agreement prior to Registration Acts—Subsequent Registered Agreement—Notice—Act XVI. of 1864*—Act XX. of* 1866, *Sec.* 48.

A lien created by verbal contract and deposit of title-deeds of immoveable property in the island of Bombay by a Hindú in favour of a Hindú upheld.

Where such a lien was created before the 1st of January 1865, when the first general Registration Act (XVI. of 1864) came into force, and a Gujaráti document (unregistered) was subsequently (on the 13th of June 1865) executed by the giver of the lien which set out its particulars, and acknowledged the receipt of the loan on account of which the lien was given : *it was held* that the original oral contract of lien, being in itself a perfected transaction, was not merged in or invalidated by the subsequent document, and that, therefore, the fact of the latter not being registered did not affect the validity of the prior transaction.

Sec. 48 of Act XX. of 1866, which enacts that all instruments duly registered under that Act and relating to moveable or immoveable property shall take effect against any oral agreement relating to the same property, does not apply to oral agreements completed before Act XVI. of 1864 came into force.

The English equitable doctrine of notice where there is a contest as to the priority of a deed registered under Act XVI. of 1864, or Act XX. of 1866, over an unregistered deed of a date prior to those Acts, is applicable in India.

THE facts of this case fully appear from the judgment of the Court.

The suit was tried by BAYLEY, J., in a Division Court, in January 1870, when the hearing occupied several days.

Green (with him *Scoble*, Acting Advocate General) for the plaintiff.

Mayhew and *Starling* for the defendant.

Cur. adv. vult.

25th March 1870. BAYLEY, J.:—The plaint in this suit, which was filed on the 3rd of April 1869, prayed that it might be declared that certain legal and equitable mortgages of a piece of land, with the dwelling-house and buildings standing

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thereon, situate at Naigám, within the sub-district of Máhim, in the island of Bombay, alleged to have been made on or about the 13th of June 1865 to one Mávji Prágji, might have priority over a certain mortgage thereof, by an indenture dated the 28th of August 1866, to the defendant; and that the plaintiff was entitled to recover possession of the said mortgaged premises from the defendant; that the defendant might be decreed to deliver up possession to the plaintiff of the property in question; and that the plaintiff might have such other relief as the nature of the case might require.

The case came on for hearing before me on the 8th of January last, when the following issues were raised:—

1. Whether the Gujaráti instrument or mortgage of the 13th of June 1865 in para. 3 of the plaint mentioned, notwithstanding its non-registration, entitles the plaintiff to priority over the defendant's registered mortgage of the 28th of August 1866.

2. Whether any valid equitable mortgage or charge was made in favour of Mávji Prágji—an issue which, under the powers given by Sec. 141 of the Code of Civil Procedure, I have amended, and which now stands as follows:—Whether any valid lien, charge, or contract for a security on the lands and premises in the plaint mentioned was, on or about the 31st of October 1864, created or made in favour of Mávji Prágji.

3. Whether the defendant lent his money, and was placed in possession of the mortgaged premises, in consequence of the representations alleged in paragraph 3 of the written statement.

(Issues 4, 5, and 6 are not material for the purpose of this report.)

7. Whether the plaintiff is entitled to the relief prayed, or any part thereof.

Before examining the evidence adduced on behalf of the plaintiff, I will remark that the plaint describes, and, as was admitted at the hearing, correctly describes, the plaintiff to be a Hindú, and the defendant a Pársi.

By cl. 29 of the Charter of the late Supreme Court, dated the 8th of December 1823, it was directed and ordained that the Supreme Court should have full power to hear and determine all suits and actions that might be brought against the inhabitants of Bombay, with certain exceptions in favour of Muhammadans and Gentús; "and, where one of the parties shall be a Mahomedan or Gentoo, by the laws and usages of the defendant."

That clause, as was pointed out by Sir Joseph Arnould in delivering judgment, on the 11th of February 1869, in *Davlatrám Shrírám* v. *Bulákidás Khemchand* (*a*), was continued in force by cl. 18 of the Letters Patent of the High Court of 26th June 1862 and cl. 19 of the Amended Letters Patent of 28th December 1865.

Here the defendant is a Párs inhabitant of, and a resident in, the island of Bombay. He is, therefore, subject to English law. This appears to be clear from two recent decisions in the Bombay High Court.

In *Naoroji Berámji* v. *Rogers and others* (*b*), decided on the 1st of August 1867 by Sir Richard Couch, C. J., and Westropp, J., which was a suit for the specific performance of an agreement for the renewal of a lease of a house and premises within the Fort in the island of Bombay, the Court, in giving judgment, say (pp. 11 and 12): "Until the recent legislation in the year 1865" (Act XV. of 1865, the Párs Marriage and Divorce Act, 1865; Act XXI. of 1865, to define and amend the Law relating to Intestate Succession among Pársis; and Act X. of 1865, the Indian Succession Act, 1865) "the law uniformly applied to Pársis and their property in the island of Bombay by the Supreme Court, and, since it was closed, by the High Court at its Original Jurisdiction side, has been, as correctly stated in the clear and able Report of the Párs Law Commission (of which Sir Joseph Arnould and Mr. Justice Newton were members), the English law, except so far as it is varied by Act IX. of 1837, and also, since the decision of the Privy Council in

(*a*) 6 Bom. H. C. Rep., O. C. J. 24.
(*b*) 4 Bom. H. C. Rep., O. C. J. 1.

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1856 in *Ardasir Cursetjee* v. *Perozebace* (*c*), except as to matrimonial suits at the Ecclesiastical side of the court, and perhaps except as to bigamy. Whether, then, we have regard to the plaintiffs" (Messrs. Rogers and Co., who were European British subjects), "or to the defendant and his wife" (who were Párs'is), "the law applicable to this case was English law."

And in *Mancharshá Aspándiárji* v. *Kamrunisá Begam* (*d*), decided on the 22nd of July 1868, on appeal from the decision of the District Judge of Súrat, which was a suit brought by a Muhammadan against a Párs'i to redeem certain property in the Mofussil which had been conveyed by the ancestor of the former to the ancestor of the latter by a *by-al-wafa* or deed of conditional sale, Sir Richard Couch, C.J., said: "This was a contract entered into between the Hindú agent of a Muhammadan of the one part, and a Párs'i on the other part. The Judge, in an élaborate judgment, has treated the question according to Muhammadan law, but there is no authority for his doing this. According to Sec. 26 of Reg. IV. of 1827, this case is to be governed by the law of the defendant, who is a Párs'i. There is no law generally applicable to Párs'is in India, but the law applicable to them within the jurisdiction of the High Court on its Original side is that which is applied to British-born subjects, and in the absence of any specific law for the Párs'is in the Mofussil, the rule of justice, equity, and good conscience should be observed; and in such cases we should follow, with certain necessary qualifications, the practice of Courts of Equity in England."

The hearing of the evidence, and of the extremely able arguments on the various points of law which were addressed to me by Mr. Green on behalf of the plaintiff, and by Mr. Mayhew on behalf of the defendant, occupied the sittings of the Court on the 8th, 10th, 13th, and 14th of January last, when the following facts appeared in evidence:—

By an indenture, bearing date the 21st of May 1864, in the English language and form, attested by Mr. Charles Peile,

(*c*) 6 Moo. Ind. App. 348.
(*d*) 5 Bom. H. C. Rep., A. C. J. 109.

then and now a solicitor of this court, and Bamanshá Kávasji, a witness in this suit, and the managing clerk of the then firm of Messrs. Bickersteth, Cleveland, and Peile, made between Daniel Francis Moorzalo of Bombay, described in the indenture as of Bombay Christian inhabitant, of the one part, and Devji Keshavji, therein described as of Bombay Hindú inhabitant, of the other part, after reciting that Moorzalo was seised of, or otherwise well and absolutely entitled to, an estate equivalent to an estate of inheritance in fee simple, in possession of, and in, the piece of ground, messuage, and hereditaments thereinafter described, and thereby conveyed or intended so to be, and that Moorzalo had agreed to sell the same to Devji Keshavji, Moorzalo, in consideration of Rs. 34,900 that day paid by Devji, granted the land and premises at Naigáṁ now in dispute unto, and to the use of, Devji Keshavji, his heirs and assigns for ever.

Devji Keshavji entered into possession of the said premises so conveyed to him by the above indenture.

Devji Keshavji, who with Tulsidás Devji, one of his five sons, traded in Bombay under the style or firm of Keshavji Chattu, being in want of money for the purposes of his firm towards the latter part of the same year (1864), applied to one Karsandás Mádhavji, the *munim* of Mávji Prágji, a Hindú who lived at Modikháná, in the Fort of Bombay, for a loan of Rs. 25,000 from Mávji Prágji, and on the 31st of October 1864 Devji Keshavji handed to Karsandás Mádhavji (on which day an advance of Rs. 1,500 was made) the title-deeds connected with the property at Naigáṁ.

The plaintiff's case at the hearing was rested partly upon the deposit of title-deeds, and partly upon the Gujaráti document of the 13th of June 1865, but most reliance appears to have been placed by the learned counsel for the plaintiff upon the former transaction. (His Lordship here reviewed the evidence relating to the deposit of the title-deeds, and the execution of the Gujaráti document of the 13th of June 1865, and continued.) In substance, therefore, Karsandás, on the 31st of October 1864, agreed, on behalf of his master, Mávji Prágji, to advance Rs. 25,000 to Devji and his son

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Tulsidás upon security of the title-deeds, or, as the witness expresses it, by way of mortgage, of Devji's property at Naigáṁ; and on that day, namely, the 31st of October 1864, the title-deeds were deposited by Devji with Karsandás, an advance of Rs. 1,500 obtained, and a Gujaráti receipt taken, in which it was stated that the money had been received, and in security therefor the oart had been mortgaged, the English word "mortgage" being written in Gujaráti. That on the following days further sums were advanced and similar receipts taken, viz:—

	Rs.
On 11th April 1865	2,000
20th „ „	2,000
29th „ „	6,000
3rd May „	8,000
5th „ „	3,500
6th „ „	175
10th June „	1,800
13th „ „	25
To which add amount advanced	23,500
31st October 1864	1,500
	Rs. 25,000

A few days before the last advance of Rs. 25 Karsandás prepared a document in Gujaráti, which was subsequently dated the 13th of June 1865, addressed to Mávji Prágji, represented by Karsandás Mádhavji, and signed in the partnership name of Devji Keshavji's firm "Keshavji Chattu, represented by Devji and Tulsidás, his signature," in which it was stated that Rs. 25,000 had been received or borrowed at interest on different dates in ready cash and currency notes, and after giving the particulars of the amounts and dates the official translation of the document by Mr. Flynn, the Chief Translator of the High Court, proceeded as follows:— "According to these particulars I have received or borrowed from you at interest Rs. 25,000 in cash and currency notes. On account of the same (there are mortgaged) at your place my piece of land at Naigáṁ, namely, a garden with a building

(or) a bungalow, which (land) is registered under No. 36 in the Collector's books, and the building or dwelling-house built on the said piece of land that is registered under No. ——in the books of the house-assessment Collector. All the deeds and other 'vouchers' relating to the said land having been left in mortgage at your place, Rs. 25,000, namely, twenty-five thousand, have been received (or borrowed) at interest thereon for an unlimited time. Interest thereon has been agreed upon at the rate of Rs. ¾, namely, twelve annas per 1 centum per 1 mensem. The same accordingly accrues. I am duly to pay to you the said money with the interest whenever you may demand (the same). I am not to raise any objection or dispute in respect thereof. This instrument I have given in writing to you of my own free will and accord in sound mind. It is agreed to and approved by me and my heirs and representatives. The 4th Jeṭh Vadya of Saṁvat 1921, the day of the week Tuesday, the 13th day of June in the English year 1865.

(Signature &c. as follows:—)

Th. (Thakar) Keshavji Chattu, represented by Devji and Tulsidás, his signature. Agreeably to what is written above, it is valid."

As soon as this document had been executed all the receipts were torn up.

Such being the undisputed facts connected with the transaction between Devji Keshavji on the one side and Karsandás Mádhavji on behalf of Mávji Prágji on the other, and no evidence on the subject having been offered on behalf of the defendant, I now proceed to consider the rights, if any, acquired by Mávji Prágji on the 31st of October 1864 or afterwards in respect of the land and premises the subject-matter of the present suit.

It appears to be quite settled that "there is no transaction of Hindú Law which absolutely requires a writing. Contracts of every description, involving both temporal and spiritual consequences, may be made orally:" per Holloway, J., in delivering the judgment of the High Court at

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Madras in *Crinavásammál* v. *Vijayammál* (*e*), in which case the court held that a Hindú may make a nuncupative will of property, whether immoveable or moveable. A similar decision took place in November 1867 in the High Court at Calcutta, when it was held that in India there are no formalities to be gone through in order to the constitution of a valid will, and all that is required is that the intention of the testator should be ascertained—in whatever way it may be ascertained, whether by word of mouth or in writing—clearly and unmistakeably: *Sudanund Mohapattur* v. *Soorjo Monee Debee* (*f*).

This, so far as my experience has gone, has always been treated as the law in the High Court in Bombay.

It was said by Lord Chelmsford, in the course of the argument in *Shreemutty Anundlomohey Dossee* v. *Doe dem. The East India Company* (*g*), that one Muttyloll Seal was a Hindú, and that he could, by the Hindú law, pass land without writing. The Lords of the Privy Council held that a freehold interest cannot be created by parol or by an informal written instrument; but at page 65 they say: "The Agent passed no legal interest out of the East India Company to Muttyloll Seal. The Company did not grant, nor did they intend to grant, as Hindús; if they had so intended they must have failed in their intention, for they could only grant according to law. Yet the instrument was binding upon them as an agreement, and a Court of Equity would have protected the appellants against any attempt to dispossess them contrary to its stipulations. Notwithstanding the provision which it contains for a month's notice, the East India Company might have maintained an ejectment the day after the agreement was entered into, because it passed no legal interest, but they could have been instantly restrained from proceeding by a Court of Equity."

Now here Devji Keshavji and Mávji Prágji are both Hindús and live in the island, and, therefore, within the local limits of the High Court of Bombay. The one, on or

(*e*) 2 Mad. H. C. Rep. 37. (*f*) 8 Calc. W. Rep., Civ. R. 455.
(*g*) 8 Moo. Ind. App. 54.

before the 31st of October 1864, agrees to borrow, and the other agrees to lend, moneys on the security of Devji Keshavji's property at Naigám, and the one on that day deposits and the other receives Devji's title-deeds, the delivery of them apparently taking place in Mávji Prágji's house or shop at Modikháná, within the Fort, as security for an advance of Rs. 25,000 agreed to be made on security of the property mentioned in the deeds—an advance which, it is sworn, would not have been made upon personal security. Of the sum so agreed to be advanced, Rs. 1,500 are actually paid by Karsandás to Devji Keshavji on that day (31st October 1864), and a receipt given in which the English word "mortgage" is inserted in Gujaráti, in order that there may be no mistake as to the security on which the money was advanced.

It was argued on behalf of the defendant that there can be no equitable mortgage in the strict English sense between Hindús; and Mr. Mayhew stated that he had not found any Indian case in which an equitable mortgage had been given as distinct from a legal one.

There is, however, authority upon the point.

In a case (not cited at the bar), *Sibchundar Ghose* v. *Russick Chunder Neoghy* (*h*), decided by the Supreme Court at Calcutta in July 1842, the then Chief Justice, Sir Lawrence Peel, in the course of his judgment, said (p. 62) that he laid aside in the consideration of that case the deposit of the title-deeds, and that the question was one exclusively of Hindú law, to which the doctrine of an equitable mortgage was inapplicable.

In that case there was a demurrer to a bill of review, the chief ground of demurrer being that a form of instrument called a "Bengáli mortgage" must be accompanied by possession in order to constitute a charge upon the lands over which it extends. It was held by Sir Lawrence Peel, C.J., and Sir Henry Wilmot Seton (the author of the well-known work on decrees), against the opinion of Sir John

(*h*) 1 Fulton 36.

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Peter Grant, that such a mortgage, even though unaccompanied with possession, gives a lien upon lands.

Sir Lawrence Peel, in the course of his elaborate judgment, said (p. 62): "The principal question remaining to be considered is whether by the Hindu law the execution of the instrument set forth in the complainant's bill, one of that class of instruments commonly designated Bengali mortgages, accompanied by a deposit of the title-deeds of the property which that instrument purports to pledge, but neither accompanied nor followed by any possession of that property by the alleged mortgagee, constitutes a perfected contract of pledge, so as to give a security upon the lands. I lay aside, in the consideration of this case, the deposit of the title-deeds. The question is one exclusively of Hindu law, to which the doctrine of an equitable mortgage is inapplicable. The deposit cannot, in my opinion, be considered as a symbolical transfer of the lands; there is nothing to show that it was intended so to operate, and it is unnecessary to consider whether it could so have operated, had that intention been apparent. Nor can I consider the deposit as indicating an intention and agreement that the transaction should be governed by the English law, since the principal instrument, being in a form common amongst the Hindus, and conforming to their laws and usages, rebuts any presumption of the adoption in the particular contract of the English law."

The learned Chief Justice then proceeds (p. 63) to consider the validity of the instrument as a perfected contract of pledge, first upon the written texts to which the Judges are in the habit of referring as authorities on questions of Hindú law, and next upon the decisions which, as evidence of the practice and usage amongst that people, may, upon the principles of that very law, control the texts to which they may be opposed.

He examines the texts and finds that they are far from uniform, and proceeds thus (p. 64): "Had these written authorities not been, as in my judgment they are, conflicting,

still I should have felt myself bound to decide this case on the practice and usage under which such instruments unaccompanied by possession have been received and acted on, as valid and effectual securities evidenced, as that practice and usage are, by judicial decisions in accordance with the view which I take of this question.

"The decisions of the Company's courts upon this subject may, in my opinion, as the judicial decisions of courts of competent jurisdiction upon the point, be viewed by us as evidence of the Hindu law on the subject. And it is beyond all doubt that those courts, including the highest, the Sudder Dewanny Adawlut, treat these instruments as valid mortgages, though no possession have been had under them." (p. 65.)

The Chief Justice afterwards proceeds to notice the decisions of the Supreme Court at Calcutta, and says (p. 68): "These are collected in the Appendix to Morton's Decisions (p. 372). It is not my intention to go into a minute examination of them. Some are *exparte* decisions, others not. But there is not one in which any statement of the delivery of possession is contained in the abstract of the bill set forth, and if possession be indispensable to perfect the contract of pledge no title in the mortgagee is alleged in any one of the cases, and no decree of foreclosure could have been rightly made in any one of those suits. Viewing the whole of them together, they appear to me to furnish irresistible proof that the Court which decided them entertained, declared, and acted on the same opinion on the point which has for a long time been entertained and acted upon by the Judges of the Sudder Dewanny Adawlut, as we learn from their own communication. These instruments have become a common assurance; the English form of conveyance by lease and release has for an equal length of time been a common mode of mortgaging lands amongst Hindus; under neither mode of conveyance has any possession in fact been taken."

This case seems to be a clear authority that, as between Hindús and in Bengal, there may be a contract operating as

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a charge or lien so as to give a security upon lands, though neither accompanied nor followed by any possession of that property by the person lending money upon such security.

Parbutty Ghose v. *Bholanauth Mitter and others* (*i*) was a case before the Supreme Court at Calcutta in 1839 respecting the mortgage of a pottáh.

The late Horace Hayman Wilson, in his Glossary of Judicial and Revenue Terms, compiled and published in 1850, under the authority of the Court of Directors of the East India Company, defines a pottáh as "a deed of lease; a document given by the Collector to the Zamindar, or by some other receiver of revenue to the cultivator or under-tenant, specifying the condition on which the lands are held, and the value or proportion of the produce to be paid to the authority or person from whom the lands are held; the term is laxly applied to a variety of deeds securing rights or property in land."

The late Mr. W. H. Morley, in the Glossary in Vol. I. of his Digest (p. 640), describes a pottáh as "a lease granted to the cultivators on the part of Government, either written on paper, or engraved with a style on the leaves of the talipot-tree, by Europeans called a cadjan."

In the case now under citation (1 Fulton 368) the parties to the suit appear to have been Hindús, and the Judge, Sir Henry Wilmot Seton, treated the mortgage of the *pottáh* as an equitable mortgage of the land which it represented. The nature and character of a Bengáli *pottáh* were very fully considered by Lord Chancellor Lyndhurst in *Freeman* v. *Fairlie* (*j*), where he held that the *pottáh* granted by the Collector is not a muniment of title, but only an evidence of holding according to a local and fiscal regulation.

I next proceed to consider a case, *Varden Seth Sam* v. *Luckpathy Royjee Lallah and others* (*k*), which appears to me to be of very great importance, decided by the Privy Council

(*i*) 1 Fulton 368.
(*j*) 1 Moo. Ind. App. 305. (*k*) 9 Moo. Ind. App. 303.

in 1862, on appeal from the Ṣadr Diváni Adálat at Madras, and which was argued before the late Lord Kingsdown, before Dr. Lushington, and three Judges who had been formerly Chief Justices of the Supreme Court at Calcutta, viz., Sir Edward Ryan, Sir Lawrence Peel, and Sir James Colvile.

The question in that case related to the validity of a lien created by deposit of the title-deeds of an estate called the Muttah of Tirupassur, in the Mofussil of the presidency of Madras, in consideration of pecuniary advances made by the plaintiff, the appellant, for the benefit of that estate.

The plaintiff in the court of original jurisdiction had succeeded in establishing a lien on certain landed property called the Muttah (or district of villages) of Tirupassur. This Muttah, which was the property of the first defendant on the record, had been, as the plaintiff alleged, duly charged in his favour by the first defendant as a security in respect of the non-delivery of the title-deeds of another estate, called the Muttah of Ekattur, purchased by the plaintiff from him. After the creation of such charge the property was transferred first to the third defendant, and by him, pending the present litigation, to the last defendant, on the record, Mr. Ouchterlony. In the court of original jurisdiction and in the first appellate court the plaintiff succeeded in establishing his charge, but on appeal to the Ṣadr Diváni Adálat at Madras the decree was reversed.

The plaintiff was a Christian, and from his name appeared to be an Armenian; the first defendant was the son of the second defendant, and both were Muhammadans; the third defendant was a Hindú; and the last on the record was a Christian, and a British subject.

Though both the third and the last defendants pleaded in effect that they were *bonâ fide* purchasers for value without notice, yet they did not prove that defence, though the plaintiff charged notice and collusion with the first defendant.

Lord Kingsdown, in pronouncing the decision of the Lords of the Privy Council, after stating the above facts, proceeded

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as follows, and in words which, in my opinion, have a very important bearing upon the present case :—

"It appeared in evidence that, on the non-production of the title-deeds of the estate, *Ekattur*, it was promised on the part of the seller that they would be produced in a few days, but this promise was not fulfilled, as they proved to be in the possession of a prior incumbrancer. The plaintiff was obliged, in order to procure them, to pay off this incumbrance, and, having previously paid a large part of the purchase-money, his whole payments exceeded the purchase-money by a considerable sum (Rs. 3,810), for which, with interest, he claimed to be indemnified by his alleged security on the pledged estate. The contract of pledge contained also a further stipulation of purchase.

"The decision of the Sudder Dewany Adawlut, so far as it respects the enforcement of the lien against the third and last defendants, appears to have proceeded upon the ground that the principles of the English law applicable to a similar state of circumstances ought not to govern the decision of that suit in those Courts. This was correct if the authoritative obligation of that law on the Company's Courts were insisted on. There is, properly, no prescribed general law to which their decisions must conform. They are directed in the Madras Presidency to proceed generally according to justice, equity, and good conscience. The question then is, whether the decision appealed against violates that direction or not. The Court of appeal, reversing the prior decisions, has decided that the contract was not operative as a hypothecation, or pledge, even between the parties to it. Yet the evidence shows that the plaintiff looked, not simply to the personal credit of the person with whom he contracted, but bargained for a security on land. If any positive law had forbidden effect to be given to the actual agreement of the parties to create that lien, the Court, of course, must have obeyed that law. If the contract of lien were imperfect for want of some necessary condition, effect must have been, in like manner, denied to it as a perfected lien. But nothing of this sort is suggested in the pleadings, or proved. It is not

shown that, in fact, the parties contracted with reference to any particular law. They were not of the same race and creed. By the Mahomedan law, such a contract as the one under consideration, for a security in respect of a contingent loss, would be one not of pawn, but of trust (Hedeya, Vol. IV., p. 208, tit. 'Pawns'). It is not declared that any writing or actual delivery is essential to the creation of such trust by that law; but, as the contracting parties are not both Mahomedans, that law would not have governed the question of the validity and force of their contract, even in the Supreme Court. The plaintiff is a Christian; the contract took place with parties living within the local limits of the Supreme Court of Madras, though it related to land beyond them. It is not shown that any local law, any *lex loci rei sitæ*, exists, forbidding the creation of a lien by the contract and deposit of deeds which existed in this case; and by the general law of the place where the contract was made, that is, the English law, the deposit of title-deeds as a security would create a lien on lands; though, as between parties who can convey by deed only, or conveyance in writing, such lien would necessarily be equitable. In this case there is an express contract for a security on the lands, to which, no law invalidating it, effect must be given between the parties themselves. The circumstance that the plaintiff had not sued for a specific performance of the contract to sell the land to him (on which the Sudder Court laid some stress), does not in the least affect his claim for a lien. By the contract this latter interest is immediately created, and expressed to be immediate. The sale is contemplated as future. The first defendant's own acts, in dealing with his land as he did, would effectually bar him, and those taking derivative titles from him, from insisting on this objection, if it had had any original foundation of justice and equity to support it; but, in truth, they are distinct and independent parts of the same contract.

"The contract, then, created between the parties a lien on the land. It is immaterial for the decision of this suit to consider or decide whether that lien between these parties,

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looking to the power in the first defendant to convey without writing, is legal or equitable (*Doe dem. Seebkristo* v. *The East India Company*, 6 Moore's Ind. App. Cases, 267)."

In the case now before me the evidence shows that Karsandás Mádhavji lent the money of his master, Mávji Prágji, on the security of the oart; and, as I have already pointed out, he swore that he would not have lent the money on the personal security of Devji Keshavji and his son Tulsidás. "I only agreed" (he says in examination) "to lend the money on mortgage. I took the receipts to show the moneys were lent on security of the oart. It was mentioned in all the receipts that there were deeds of the oart."

Then, even assuming (what I am not prepared to admit) that the present defendant, a Párși, is entitled to rely on the Hindú law, on the ground that the contracting parties were both Hindús, it must be borne in mind that the contract took place between persons living within the local limits of the High Court at Bombay, and that the contract related to land within such local limits. No law that I am aware of exists in the city of Bombay forbidding the creation of a lien or charge by a contract and deposit of deeds, such as that which existed in this case; and by the general law of the place where the contract was made, that is, the English law, and by which law the defendant, a Párși, is bound, the deposit of title-deeds as a security would create a lien on land. Devji Keshavji, a Hindú, could convey or make any contract he chose without writing, and I cannot see what is to affect the validity of a lien so created by a verbal agreement between the parties. To borrow once more the language of Lord Kingsdown in the appeal from Madras, "In this case" (and the contract there, though made in Madras, related to lands in the Mofussil) "there *is an express contract for a security on the lands, to which, no law invalidating it, effect must be given between the parties themselves.*

"*The contract, then, created between the parties a lien on the land.* It is immaterial for the decision of this suit to consider or decide whether that lien between these parties, look-

ing at the power of the first defendant" (a Muhammadan) "to convey without writing, is legal or equitable" (*l*).

There would, moreover, be this difficulty in ignoring an equitable mortgage, that a second mortgage would be invalid, as the equity of redemption only is conveyed. But second mortgages, which are mortgages of an equity of redemption, are constantly recognised in this court. To hold that a Hindú mortgage can only be of the legal estate, and that possession must be given, would in effect overturn decrees passed in this court (*m*), as well as be contrary to what has been and is the general practice of persons in Bombay; for it is a matter of frequent occurrence in this island for natives to obtain an advance of money upon the security only of a deposit of title-deeds. It was stated, too, by counsel that in a recent case before Mr. Justice Westropp, *Sarasvatibái* v. *Vithobá Pánḍurang*, effect was given to an equitable mortgage.

It was objected by the learned counsel for the defendant that although the loan was from the very first for Rs. 25,000 on mortgage of the cart, yet that the deposit was made accompanied with a writing which alone can be looked at for the purpose of seeing what right (if any) the plaintiff has against the land. That all acts previous to the execution of the Gujaráti document of the 13th of June 1865 led up to and merged in that instrument, which, it was argued, was in fact a substitution for all previous writings. That, the English word "mortgage" having been written in the vernacular in the receipts, it was intended that Mávji Prágji should have a mortgagee's right against the land. That the word "mortgage" used in the receipts, and in the Gujaráti document of the 13th of June 1865, must be construed so as to create an interest in the land, and that as the receipts and the Gujaráti document were confessedly not registered under the Indian Registration Act No. XVI. of 1864, Sec. 13, or any other Registration Act, they could not be looked at or be

(*l*) 9 Moo. Ind. App. 322.

(*m*) See *Vithaldás Narotamdás* v. *Karsandás Keshavdás*, 5 Bom. H. C. Rep., O. C. J. 76.

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considered as conferring any title upon Mávji Prágji, or derivatively through him upon the plaintiff.

I do not think these objections are well founded.

On the 31st of October 1864, the day on which all the title-deeds were handed over to Karsandás and the first advance of Rs. 1,500 was made and the first receipt given, the first Indian General Registration Act, No. XVI. of 1864, was not in force, as by Sec. 71 of that Act it is provided that the Act should take effect on the 1st of January 1865. There was, in fact, on the 31st of October 1864, no compulsory registration whatever in the island of Bombay.

I consider that the contract for a security on the land was created when the loan was applied for and agreed to, and when the deeds were handed over to Karsandás; and that the receipt then and those subsequently given did not, nor did the Gujaráti document of the 13th of June 1865, on which day Rs. 25, the last instalment of the Rs. 25,000, was advanced, create or declare any right or interest within the meaning of the Registration Acts. The rights of the parties, be they legal or be they equitable, had already been created and perfected on the 31st of October 1864, and it required no memorandum or writing to render such rights valid, nor in fact was there evidence that any such document, or any deed or writing, was on the 31st of October 1864 contemplated by the parties. Suppose the receipts and the instrument of the 13th of June 1865 had never existed, the lien or charge on the property would still, in my opinion, have been perfect and valid. The fact of such informal Native documents being subsequently given and executed after the transaction had been completed cannot, I think, in any way be held to affect the validity of that which Sir Lawrence Peel, in the Calcutta case (*n*), calls "*a perfected contract of pledge,*" or, to borrow the words of Lord Kingsdown, (*o*), was a "*contract which created between the parties a lien on the land.*"

In general, no doubt, where a contract has been reduced into writing by the parties, the writing is the best evidence

(*n*) 1 Fulton 63. (*o*) 9 Moo. Ind. App. 322.

of it, and must be produced. But it is not in every case necessary, where the matter to be proved has been committed to writing, that the writing should be produced. If, for instance, the narrative of an extrinsic fact has been committed to writing, it may yet be proved by parol evidence. Upon this principle a receipt for money given on unstamped paper will not exclude parol evidence of the payment, and the paper on which it is written may be produced not as evidence of itself, but as a material memorandum which a witness who saw it given may refer to, and give parol evidence of the fact of payment: *Rambert* v. *Cohen* (*p*); 1 Taylor on Evidence, p. 412 (5th ed). So a verbal demand of goods is admissible in trover though a demand in writing was made at the same time: *Smith* v. *Young* (*q*). The fact, too, of birth, baptism, marriage, death, or burial may be proved by parol testimony, though a narrative or memorandum of these events may have been entered in registers which the law requires to be kept; for the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact, which may furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence, though its non-production may afford grounds for scrutinising such evidence with more than ordinary care: 1 Taylor on Evidence, p. 413.

Two decisions (not cited at the bar) upon the English Stamp Laws may, I think, not inaptly be quoted here.

In *Beeching* v. *Westbrook* (*r*), which was an action for board and lodging supplied to an illegitimate child of the defendant, letters of the defendant containing promises to remit money to the plaintiff, and making excuses for not having done so, were held not to require an agreement-stamp as being "evidence of a contract" within the meaning of those words in the Stamp Act 55 Geo. III., c. 184, Sched. Part I., tit. "Agreement." Mr. Baron Parke said that a stamp was not imposed by the Act upon every document which

(*p*) 4 Esp. 213. (*q*) 1 Campb. 439. (*r*) 8 M. & W. 411.

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refers to, and so furnishes evidence to prove, an agreement; it was required only on documents in which the parties put down the terms by which they intend to be mutually bound; and that he was clearly of opinion that a written instrument, to come within the clause, must have been made with the intention of containing in itself the terms of an agreement between the parties. Mr. Baron Alderson said that those letters only require a stamp which are written, if he might so express himself, while the agreement was being made; but no stamp was necessary upon letters which were written after the agreement had been made.

That decision was followed by the Court of Queen's Bench in *Fancourt* v. *Thorne* (*s*). There the defendant made a promissory note in the following terms:—"On demand I promise to pay W. T. Hodsoll or order £500 for value received, with interest at the rate of 4 per cent.; and I have lodged with the said W. T. Hodsoll the counterpart leases signed by G. Davis, J. Jewell, Wm. Hill, and Wm. Gould for ground let by me to them respectively, as a collateral security for the said £500 and interest. £500. Wm. Thorne."

This paper was stamped as a promissory note, and it was objected at the trial that in respect of the latter part of it there should also have been a stamp as for a mortgage or agreement. The Judge, Mr. Justice John Williams, admitted the note, giving leave to move for a nonsuit. On showing cause against the rule, it was argued by Mr. Maynard that no stamp was requisite in respect of the latter part of the instrument even if considered by itself. That it was not a mortgage at all; it was a memorandum of a fact only, and neither constituted nor furnished evidence of a contract. On the other hand, Mr. Butt and Mr. Gray contended that there was an equitable mortgage, or at least a writing furnishing evidence of a contract of lending and borrowing, without any stamp. Mr. Justice Patteson, interposing at this point, said "No, it is merely an assertion of the fact of the deposit. How can you distinguish the case from *Beeching* v. *Westbrook* (*t*)?

(*s*) 9 Q. B. 312. (*t*) 8 M. & W. 411.

How can you say it is an instrument binding the parties?" Lord Denman, C.J., said: "It merely mentions a fact which in itself might be treated in Chancery as a mortgage: the written instrument is no mortgage. * * * This is not a contract between parties: it is *in vacuo*."

I find a difficulty in distinguishing these two cases in principle from the present one.

I will next call attention to three decisions upon the statute of Anne (7 Anne, c. 20) requiring deeds or conveyances affecting lands in Middlesex to be registered, which, though not cited at the bar, are, I think, well worthy of notice.

In the first case, *Sumpter* v. *Cooper* (*u*), a debtor had deposited the title-deeds of houses with his creditor as a security, and afterwards executed an assignment of his interest in the houses to the same party, but this instrument was never registered pursuant to the Stat. 7 Anne, c. 20. The debtor afterwards became bankrupt, and the assignment of his effects under the commission was duly registered. The assignee brought an action against the creditor for the rents of the houses which he had received from the time of the assignment made to him by the bankrupt. Lord Tenterden, C.J., directed a nonsuit, reserving liberty to the plaintiffs to move to enter a verdict in their favour if the court should think the equitable mortgage unavailable. Lord Campbell, then Mr. Campbell, moved accordingly, and argued that whatever lien the defendant had upon these houses as equitable mortgagee was merged when he took an absolute assignment of the same property, and that by that assignment his title must stand or fall (a similar argument to that urged by Mr. Mayhew in the present case).

The Court took time to consider, and subsequently gave judgment sustaining the ruling of the learned Judge. Lord Tenterden, C.J., said: "We are of opinion that the non-suit was right. The defendant was the equitable mortgagee of the bankrupt's moiety of the premises, and having received the whole of the rents he would have had an equitable

(*u*) 2 B. & Ad. 223.

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right to retain them against the bank if he had remained solvent, and he has the same right against the assignees, who can only recover that to which the bank was both legally and equitably entitled. As to the Statute of Anne, we think it cannot be held to apply to the case of an equitable mortgage. It refers only to the registration of deeds, and where there is merely a lien or equitable mortgage created by the deposit of deeds there is no instrument to be registered."

In *Wright* v. *Stanfield* (*v*) Lord Romilly held that an agreement to mortgage a Middlesex property did not come within the Middlesex Registry Act (7 Anne, c. 20); and, therefore, that where the owner of property in that county had first mortgaged to A, and then agreed to mortgage to B, and had subsequently mortgaged to C, and C had registered and B had not; he held that C had not obtained priority over B: saying that he thought it clear that the Registry Act does not require the registration of a memorandum like that given to the plaintiff.

In a subsequent case, *Moore* v. *Culverhouse* (*w*), Lord Romilly, distinguishing it from *Wright* v. *Stanfield*, held that an unregistered equitable charge on the equity of redemption of a property in Middlesex must be postponed to a subsequent registered mortgage of it, being of opinion that the word "conveyance" in the Act (7 Anne, c. 20) applied to equitable as well as to legal incumbrances, and that the memorandum of actual charge in that case was within the Act.

It was decided by Norman and Seton-Karr, JJ., in 1867, in *Bunwaree Lal* v. *Sungum Lal* (*x*), that it was not intended that compulsory registration under Sec. 13 of the General Registration Act XVI. of 1864 should apply to deeds which are merely preliminary to the main contract or engagement, or that deeds which are steps in, or mere parts of, a transaction should be registered before they could be used as evidence. And in a recent case decided by Mr. Justice Macpherson on the 19th of April 1869, *Bhairabnath Khettri* v. *Kishori*

(*v*) 27 Beav. 8. (*w*) 27 Beav. 639.
(*x*) 7 Calc. W. Rep., Civ. R. 280.

Mohan (*y*), it was held that an agreement for a lease does not require registration, Mr. Justice Macpherson saying that he thought the agreement did not come under Sec. 17 of the Registration Act, as it only led up to a lease; that if he were to hold that an agreement such as that required to be registered, he should also have to hold that an agreement to register required registration; and that the case was governed by the case of *Bunwaree Lal* v. *Sungum Lal*.

The High Court at Bombay has also arrived at a similar conclusion with respect to an agreement for the purchase of land in Bombay. I allude to the case of *Hargovandás Girdharlál* v. *Bálkrishna Kánobá* (not reported), which was an appeal from a decision of Sir Charles Sargent, and was argued by myself, when at the bar, for the appellant, and defendant before, and decided on the 4th of October 1866 by, the court of appeal, presided over by Sir Richard Couch, C.J., who has courteously placed his note-book at my disposal.

The suit in that case was for the specific performance of an agreement in the native language for the purchase of land in the island of Bombay. I argued, as I had already unsuccessfully done before the court below, that the document ought to have been registered, under Sec. 13 of Act XVI. of 1864. The Court held, however, in conformity with the decision of Sir Charles Sargent, that the instrument which contemplated the execution of a regular deed prepared in an attorney's office did not require to be registered, and the decree in favour of the plaintiff below was confirmed, and the appeal dismissed, with costs.

The case of *Sheikh Rahmatulla* v. *Sheikh Sariutulla Kagchi* (*z*), decided by Sir Barnes Peacock, C.J., and four other Judges, in August 1868, was much pressed on me in argument by the learned counsel for the defendant, and the following passage from the judgment of Mr. Justice Macpherson (p. 88), which is well worthy of being cited here, is one to which I entirely subscribe:—

(*y*) 3 Beng. L. Rep., Appendix, p. 1.
(*z*) 1 Beng. L. Rep., F. B. R. 58.

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"It has been argued that in this country people in making a contract usually enter first into a verbal contract, whether they eventually put it into writing or not; and, therefore, that though there is this unregistered *Kabula* in existence, the plaintiff may ignore it, and fall back upon the original verbal agreement. In every country, and just as much in England as in India, certain negotiations almost invariably take place before a contract is reduced to writing; and in every country it is usual that the terms of the contract should, with more or less accuracy, be agreed on verbally before the written instrument embodying them is prepared. I am not aware that any difference whatsoever exists between natives of this country and natives of any other country as regards contracts which have been entered into verbally and are afterwards put in writing. When a contract has once been put in writing and signed by the parties, the written instrument contains, and is, the only evidence of the contract, and the parties cannot give it the go-by, and fall back upon the original verbal agreement. It may be that in India a title to land may be passed without writing, but when once the sale or conveyance has been embodied in a written instrument, that instrument, and that instrument alone, contains the contract between the parties. This question has been before me on several occasions, and the more I consider it, the more I am confirmed in the opinion which I have now expressed, and which I first expressed in the case of *Manmohini Dasi* (*a*). The point really involved is whether or not the court, by admitting parol evidence of unregistered deeds, are to assist parties in ignoring and evading the provisions of the Registration Act."

In accordance with those principles the case of *Kala Chand Mundul* v. *Gopal Chunder Bhuttacharjee* (*b*), cited by Mr. Mayhew, was decided in Calcutta by Jackson and Markby, JJ., in July 1869. There the suit was brought upon a document by which the lien was actually created, and as the document was unregistered it was held—and, I think,

(*a*) 7 Calc. W. Rep., Civ. R. 112.
(*b*) 12 Calc. W. Rep., Civ. R. 163.

properly so—that, under Sec. 49 of the Registration Act XX. of 1866, the instrument could not be received in evidence.

Now here there was no compulsory Registration Act in force within the island of Bombay when the verbal agreement for the charge or lien on the lands was made, on the 31st of October 1864; no contract was agreed to be put, nor in fact was any ever put, in writing and signed by the parties; parol evidence of the verbal contract, which was the only contract made between the parties, was clearly admissible, and, consequently, the cases just cited are no authority against the right of the plaintiff to recover in the present suit.

On the same ground may be distinguished the case of *Bhándu Rájárám* v. *Dámáji Jiváji* (*c*).

Moreover, I do not consider that Sec. 48 of Act XX. of 1866, which enacts that all instruments duly registered under that Act and relating to any moveable or immoveable property should take effect against any oral agreement or declaration relating to the same property, applies to oral agreements made previous to Act XVI. of 1864 coming into operation. To give it such a retrospective effect would be to violate a well-known canon of construction of Acts of the Legislature. Statutes are *primâ facie* deemed to be prospective only: "*Nova constitutio futuris formam imponere debet, non præteritis:*" *Doolubdass Pettamberdass* v. *Ramlall Thakoorseydass* (*d*). A retrospective effect will not be given to a statute unless the statute, by precise words, clearly shows that such was the intention of the Legislature: *Thompson* v. *Lack* (*e*). Clear and unambiguous words are necessary to give a retrospective effect to an Act of Parliament, so as to deprive a party of a vested right of action: *Marsh* v. *Higgins* (*f*).

The decision in February 1869 of Lord Hatherley, C., in *Hicks* v. *Powell* (*g*), that The Indian Registration Act of 1866

(*c*) 6 Bom. H. C. Rep., A. C. J. 59. (*d*) 5 Moo. Ind. App. 109.
(*e*) 3 C. B. 540. (*f*) 9 C. B. 551. (*g*) Law Rep. 4 Ch. App. 741.

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makes void all instruments relating to real estate in India, which ought to have been registered under the Indian Registration Act of 1864, but were not so registered, and destroys all equities arising out of them, does not affect the present case, where the lien was created before the 1st of January 1865, the day on which the Registration Act of 1864 came into operation.

Act XVI. of 1864, too, contains no section corresponding with Sec. 48 of Act XX. of 1866.

The decisions cited by Mr. Mayhew reported in 4 Bom. H. C. Rep., A. C. J. 69, that an unregistered mortgage without possession is not valid against a purchaser with possession, and in 5 Bom. H. C. Rep., A. C. J. 147, that an unregistered mortgage without possession upon which a decree has been obtained but not executed has not, by virtue of such decree, priority over a subsequent deed of sale which is registered, appear to me to differ materially from the present case.

The learned counsel asserted, but, so far as I could judge, entirely failed to show, that there was an analogy between mortgages between Hindús and in mortgages in England of ships, in which subsequent registered mortgages have priority over previous unregistered ones.

I think, too, he was incorrect in stating (as I understood him to do) generally that the decisions in India have proceeded on the ground that the English registration of land is different from the Indian land registration.

The decision of Forbes and Warden, JJ., reported in 1 Bom. H. C. Rep. 10, that a registered deed was entitled to priority over an unregistered deed of an earlier date; and that of Mr. Justice Holloway and Mr. Justice Collett, reported in 3 Mad. H. C. Rep. 89, that a registered deed of sale, though subsequent in date, invalidates, as against the registered purchaser, a prior deed of sale unregistered, notwithstanding that notice of the prior deed be alleged; the decision of Newton and Westropp, JJ., reported in 2 Bom. H. C. Rep. 213, that a registered *mirásپatra* was entitled to pre-

ference over an unregistered *miráspatra* of a prior date accompanied with possession; that of Newton and Warden, JJ., in 2 Bom. H. C. Rep. 233, giving preference to the latter of two deeds of sale of immoveable property when registered over the earlier unregistered deed, though the first deed had not been carried into effect, as every duly registered deed of sale, if authentic, invalidates any other deed of sale which may not have been registered—cited by Mr. Mayhew; and the decision of Sir Barnes Peacock, C.J., and Mitter, J., in August 1868, reported in 1 Beng. L. Rep., A. J. 197, that the purchaser under a decree for sale in satisfaction of a registered mortgage is entitled in priority to the purchaser under another decree for sale in satisfaction of another unregistered mortgage, although the latter mortgage be of an earlier date—cited by Mr. Starling—were all decisions under Act XIX. of 1843 of the Legislative Council of India, by Section 2 of which Act it was expressly enacted that every deed of sale or mortgage should invalidate a prior deed, or be satisfied in preference to any other mortgage on the same property, which may not have been registered, "any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding."

That Act (XIX. of 1843), and the five decisions just quoted founded on it, are inapplicable to the present case, for two reasons:—(1) because the Act, as well as Act I. of 1843,* which it amended and partially repealed, applied only to the Mofussil, and not to the Presidency towns of Calcutta, Madras, or Bombay; (2) because the Act XIX. of 1843 was repealed by the General Registration Act XVI. of 1864, as from the 1st of January 1865, and, consequently, had ceased to have any effect on the 28th of August 1866, the date of the mortgage under which the defendant derives his title, and upon which he rests his defence to the present suit.

I may here mention that under Act XIX. of 1843 it was not every registered deed that was entitled to priority over an unregistered one, as it was decided by the Privy

* See especially the Preamble to Act I. of 1843.

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Council in 1865, in a case on appeal from the Sadr Diváni Adálat of Bengal, *Shreenaunth Bhuttacharjee* v. *Ram Comul Gungopadya and others* (*h*), that the proviso in the 2nd section of Act XIX. of 1843, that "its authenticity be established to the satisfaction of the Court," pointed out merely the exclusion of a fraudulent deed from the benefit of the Act, as it was not intended that a deed which was tainted by fraud, although in other respects genuine, should be placed on the same footing as a *bonâ fide* deed, and, consequently, that a registered deed could be deprived of the priority given by that Act if it be proved that there was fraud on the part of the grantee.

A case was cited by counsel where the plaintiff had sued on a bond which stated not only that the money would be repaid, but that certain lands should be held to be pledged for the repayment of the loan, the lands being mentioned in the bond as collateral security. In that case Sir Barnes Peacock, C.J., and Hobhouse, J., held (January 1868)—9 Calc. W. Rep., Civ. R. 111—that the registration of such a bond was not compulsory under cl. 2, Sec. XVII. of Act XX. of 1866 (the General Registration Act now in force), and that the reception of such a bond in evidence, though not registered, was not barred by Sec. 49 of that Act, as no immoveable property would be affected by the personal or money decree sought by the plaintiff.

In the course of the argument I called attention to a decision of Kemp and Jackson, JJ., in August 1868, of *Gopal Prasad* v. *Nandarani* (*i*). There A executed an instrument in favour of B, covenanting to repay him the amount of a loan together with interest, and mortgaging certain immoveable property as security for repayment of the same. B sued A for the debt. It was held that the instrument did not directly create, declare, transfer, or extinguish any right or title in immoveable property; that the land was mentioned in the bond as a collateral security, and, therefore, the instrument was not inadmissible, under Sec. 13 of Act XVI. of 1864, the registration of the bond not being compulsory.

(*h*) 10 Moo. Ind. App. 220. (*i*) 1 Beng. L. Rep., A. J. 192.

To this I may add the decision of Sir Barnes Peacock and a full Bench, in September 1869, in *Sham Narayan Lall* v. *Khimajít Matoe* (*j*), where, in a suit for breach of a covenant to register contained in an unregistered mortgage-deed, it was held that the defendant could not plead the non-registration of the instrument for the purpose of protecting himself, and that such a deed was admissible in evidence for a collateral purpose without being registered.

I do not rely on these three cases as authorities in favour of the plaintiff, as the suits in them were brought upon the covenants, and no decrees were sought against the lands. I mention them in order to show that I have not overlooked them in the investigation of this important subject.

The point as to notice remains to be considered.

It was contended by Mr. Mayhew that the question of notice had nothing to do with the Indian Registration Acts, and I was referred generally to the cases already cited from the Bombay High Court Reports.

Those cases proceeded on Act XIX. of 1843, an Act which, while in force in the Mofussil, did away in express terms with the doctrine of notice. That Act, as I have just shown, does not apply to the present case.

I am of opinion that the mortgage to the defendant (registered though it was under Act XX. of 1866), with express notice of the previous charge created in favour of Mávji Prágji, is not entitled to priority over it.

There is an instrument in evidence in this suit, namely, the defendant's deed of mortgage dated the 28th of June 1866, registered under Act XX. of 1866, and under which the defendant claims to hold the property as against the plaintiff, by which the fact of the plaintiff's charge appears, the conveyance being expressly made to the defendant in the following words :—" Subject to a mortgage thereof made by the deposit of the title-deeds relating to the same hereditaments with one Mávji Prágji, to secure payment of any balance that might be found due on a running account with the

(*j*) 4 Beng. L. Rep., F. B. R. 1.

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said Mávji Prágji, and upon which running account there is due, on the day of the date of the execution of these presents, the sum of Rs. 20,763, for principal sums and interest."

I think that Lord Hardwicke's doctrine in the well-known case of *Le Neve* v. *Le Neve* (*k*)—that where lands in Middlesex (one of the three register counties in England), settled by a deed which was not registered, were settled upon a second marriage with notice of the former settlement, and the second settlement was registered pursuant to the Stat. 7 Anne, c. 20, the former settlement was to be preferred in equity—is applicable in principle to a case like the present occurring in Bombay, where since the 1st of January 1865 registration of certain documents has been compulsory.

Upon the same principle, an estate in the hands of a subsequent purchaser or mortgagee with notice of a prior defective mortgage has been held to be bound by it. Thus in a case where a person lent money on a surrender of copyholds which became void for want of presentment, and afterwards another person purchased the same lands from the mortgagor with notice of the prior surrender, and took a surrender and was admitted, the court decreed the subsequent purchaser either to pay the mortgagee his money or to surrender to him the legal estate: *Jennings* v. *Moore* (*l*). So a purchaser or mortgagee of the legal estate with notice of an equitable mortgage by deposit of title-deeds will be held a trustee for the equitable mortgagee to the amount of his charge: *Birch* v. *Ellames* (*m*), *Hiern* v. *Mill* (*n*). So a purchaser having notice of an equitable lien for unpaid purchase-money would be bound by it: *Mackreth* v. *Symmons* (*o*), *Grant* v. *Mills* (*p*).

To these may be added the statement of Lord St. Leonards in his Law of Vendors and Purchasers (13th edn., 1857, p. 599), that a purchaser with notice of a prior unregistered incumbrance is bound by it.

(*k*) 2 Wh. & Tud. L. Ca. in Eq. 28 (3rd ed.).
(*l*) 2 Vernon 609. (*m*) 2 Anstr. 427. (*n*) 13 Ves. 114.
(*o*) 15 Ves. 329. (*p*) 2 V. & B. 306.

The case in the Privy Council which I have already cited, *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (*q*), is, I think, a direct authority upon the question whether the doctrine of notice is applicable in India. There both the third and the last defendants pleaded in effect that they were *bonâ fide* purchasers for value without notice; but they did not prove that defence, though the plaintiff charged notice and collusion with the first defendant.

Lord Kingsdown, in delivering their Lordships' judgment on that part of the case, said (p. 322): "The question to be considered is whether the third and sixth defendants respectively possessed the land free from that lien, whatever its nature. As one who owns property subject to a charge can in general convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to defeat such prior charge. Let it be conceded that a purchaser for value *bonâ fide* and without notice of this charge, whether legal or equitable, would have had in these courts an equity superior to that of the plaintiff, still such innocent purchase must be not merely asserted, but proved in the cause, and this case furnishes no such proof.

"To give effect to the legal estate as against a prior equitable title would be an adoption of the English law; and to adopt it, and yet reject its qualifications and restrictions, would be scarcely consistent with justice. The law in India has not enabled a purchaser of land to look only to the apparent title on the collector's books, or the presumed title of the owner in possession. It is beyond the province of a court of justice to effect by decision a change so important as that which is involved in the principle of this decision."

And if the authority of a court in India be required to show that the doctrine of notice is applicable in this country where there is a contest between the priority of a registered deed over an unregistered deed of earlier date, I would refer to a recent decision by Glover and Mitter, JJ., on the 29th of November 1869, in the High Court at Calcutta, in *Gouree*

(*q*) 9 Moo. Ind. App. 303.

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Kant Roy v. *Gridhur Roy* (*r*) (a case which had not, I think, been reported before the concluding hearing in the present case), in which those Judges held that where a person bought an estate *bonâ fide* without any notice or knowledge of any previous sale of the property, and registered his purchase-deed under Act XVI. of 1864, his registered deed would have priority over an unregistered deed of anterior date, *but* if he bought knowing that the property had been previously sold to another party who had not registered, his deed would not be entitled to priority.

The doctrine of notice is clearly part of the law administered by the High Court of Bombay in cases arising, as the present one did, within its ordinary original jurisdiction. And if the question of notice be immaterial, the language of Sir Barnes Peacock, C.J., in the case already quoted from 1 Bengal Law Reports, F. B. R., p. 80, would, I think, have been different.

In my researches upon this subject I have found two cases which are, in my opinion, well entitled to consideration. I refer to *Whitworth* v. *Gaugain* (*s*) and *Watts* v. *Porter* (*t*).

The last case was an action against a solicitor for negligently advancing the money of the female plaintiff on bad security, whereby it became lost to the plaintiff.

Lord Campbell, C.J., in delivering the judgment of the majority of the Court (Lord Campbell, C.J., Wightman and Crompton, JJ.,) on the motion for a new trial on the ground of misdirection, said (p. 751): "The defendant's counsel mainly relied upon the great case of *Whitworth* v. *Gaugain* (*u*), which was decided by that very eminent Judge V. C. Wigram, was affirmed on appeal by Lord Chancellor Cottenham, and was approved of by Lord St. Leonards when Lord Chancellor of Ireland. To the authority of that case we implicitly bow, and we entirely concur in the reasoning on which the decision proceeded. An equitable mortgagee of lands who has completed his equitable title is to be preferred

(*r*) 12 Calc. W. Rep. Civ. R., 456; 4 Beng. L. Rep., A. J. 8.
(*s*) 1 Phill. 728. (*t*) 3 E. & B. 743.

to a creditor of the mortgagor who *without* notice of the equitable mortgage has subsequently thereto recovered judgment against the mortgagor, and obtained actual possession of the lands by writ of elegit. There certain bankers, in consideration of an existing debt and of a further advance of money to a customer, obtained from him a deposit of all the title-deeds of certain freehold and copyhold lands of which he was seised, with a written memorandum signed by him regularly charging the lands with payment of the whole debt and interest. Other creditors subsequently recovered judgments against him, and, under Sec. 13 of Stat. 1 & 2 Vict., c. 110, sued out elegits under which the Sheriff delivered to them the whole of the lands. The bankers having filed a bill in Chancery praying that they might be declared to have an equitable mortgage on the lands, and to be entitled to priority over the elegits and judgments, they prevailed. But why? Because they would have been preferred to the judgment creditors if, at the time when the judgments were recovered, the person against whom the judgments were recovered 'had, by writing under his hand, agreed to charge' the lands with the amount of the judgment debts. The elegits were allowed to have the same operation, and no more. But there was no lâches on the part of the equitable mortgagees, and before the judgments were recovered their equitable title was perfect. Wigram, V.C., considered that the memorandum, coupled with the debt and the deposit of the title-deeds, 'created as perfect an equitable charge as intention and act can possibly create;' that from that time the mortgagor became trustee for the mortgagees, and that, under an execution against him on judgments subsequently obtained, the judgment-creditors could not take for their own benefit that which was in truth the property of the *cestui que trusts*. Lord Cottenham, in affirming the decree, observed that 'by the equitable mortgage the plaintiffs acquired a special lien upon the property,' and that they had as strong an interest as if a mortgage had been executed. Proceeding on the ground that the title of the equitable mortgagees was com-

(*u*) 1 Phill. 729.

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plete, he held that they must have been preferred to the judgment creditors independently of the statute; and that, although under the statute the judgments operated as a charge upon all the lands, it must be taken as a charge subsequent to the charge before created by the equitable mortgage. Indeed, such effect is given to a perfected equitable mortgage that in *Casberd* v. *Attorney General* (*v*) it was allowed to prevail against an extent at the suit of the Crown."

The principle of these two cases applies, I think, here, because, to once more borrow the language of Lord Kingsdown in the Madras case already cited (*w*): "In this case there is an express contract for a security on the lands, to which, no law invalidating it, effect must be given between the parties themselves." * * *

Mávji Prágji had, in my opinion, on the 31st of October 1864, a lien or charge on the property created in his favour by Devji Keshavji, the owner in law and in equity of the fee simple. By the indenture of 17th February 1869 Mávji Prágji conveyed all his rights to the plaintiff. The defendant by his mortgage of the 28th of August 1866 took the property subject to the charge created in favour of Mávji Prágji, and has, so far as I can discover, no real defence to this suit.

I, accordingly, record a finding on the issues as follows:— On the second (as amended), third, fifth, sixth, and seventh for the plaintiff—first and fourth immaterial, and no finding thereon; and pass a decree, in the terms of the prayer of the plaint, in favour of the plaintiff, with costs. *

Decree for the plaintiff with costs.

Attorneys for the plaintiff: *C. E. & F. Stanger Leathes.*

Attorneys for the defendant: *Macfarlane & Skipsey.*

NOTE.—An appeal from the above decision was presented by the defendant, but was abandoned by him before argument.

(*v*) 6 Price 411. (*w*) 9 Moo. Ind. App. 322.

Suit No. 204 *of* 1869.

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July 4.

JAGANNA'THDA'S GURU'BAKSHDA'S .....*Plaintiff.*

RA'MDA'S GURU'BAKSHDA'S *et al.* .....*Defendants.*

Compromise—Attorney's Power to compromise Suit without consent of Client—Consent Decree.

A decree (embodying the terms of a compromise), made in open court upon the consent of counsel duly instructed, is binding as between the parties to the suit, although the attorney of the defendant has no authority from his client to consent to such decree, or even though he is expressly directed not to compromise, provided such want of authority is not known to the other side.

Semble that such decree is binding as between the attorney and his client, provided it embodies a reasonable and proper compromise, and is not made against the express directions of the client.

THIS suit was brought by the plaintiff to recover from the defendants (who were five in number) possession of a certain *gurúdvár* (wherein the rites of the Hindú sect called Kabírpanthi were practised,) and the moveable and immoveable property appertaining thereto. The *gurúdvár* was situated at Mazagon, in the island of Bombay.

The plaintiff claimed to recover the premises under the will of Gurúbakshdás Govardhandás, *mahant* of the *gurúdvár*, in which he appointed the plaintiff as his successor in the mahantship of the *gurúdvár*. The plaintiff alleged that, after the death of the testator, he, the plaintiff, proceeded to Kamarda, to have his appointment confirmed, as was usual in such cases, by the Achárya or High Priest of the sect, and that during his absence the defendants possessed themselves of the premises, which they refused to vacate.

The defendants denied the execution of the alleged will, and claimed to be in lawful possession of the premises.

Before the institution of the present suit, the defendants Gopáldás Gurúbakshdás and Mándás Gurúbakshdás had applied for letters of administration to the estate of Gurúbakshdás Govardhandás on the Ecclesiastical Side of the Court. The plaintiff entered a caveat. The caveat was allowed, with costs against the said defendants.

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On the 7th of January 1870, the suit having been called on for hearing upon consent of counsel on either side in open court, a decree was made by Bayley, J., which was subsequently drawn up. The decree, after declaring that the plaintiff was entitled to succeed as *mahant* to the *gurúdvár*, and all the property appertaining thereto, orders "that the defendants do deliver to the plaintiff all such *gurúdvár*, and immoveable and moveable property as they may have in their possession appertaining to the said *gurúdvár*, or that may have been mortgaged by them; and doth further order that the plaintiff shall allow the defendant Rámdás Govardhandás to reside in the *gurúdvár* at Nágpádá; and that the plaintiff do pay to each of the defendants Gopáldás Gurúbakshdás, Mándás Gurúbakshdás, Premdás Gurúbakshdás, and Baldevdás Gurúbakshdás Rupees ten every month during their lifetime, and that they be at liberty to occupy four rooms in the upper story of a *chál* situate at Grant Road, appertaining to the said *gurúdvár*, rent-free, during the full period of their natural lives, and that the plaintiff shall not eject any of the aforesaid defendants out of their respective premises during their lifetime, and the aforesaid defendants are not to sublet them, or any portion of them, to any person or persons; and should the defendant Rámdás Govardhandás be unwilling to stay with the plaintiff as proposed above, in that case he shall occupy a room in the aforesaid *chál*, besides the four already mentioned, and receive Rupees ten a month; and this court doth further order that the receiver (appointed herein) be discharged," &c. * * * "and this court doth further order that the plaintiff do pay Messrs. Macfarlane and Green, the attorneys for the defendants, the sum of Rupees two thousand one hundred and thirty, in full of all their claims, for defendants' costs of this suit, and that Náráyan Dinánáth, the receiver aforesaid, do pay the said sum on behalf of the plaintiff out of the moneys received by him; and this court doth lastly order that the defendants Gopáldás Gurúbakshdás and Mándás Gurúbakshdás be discharged from all the costs incurred on behalf of the caveator in the matter of the late Gurúbakshdás, and be relieved from the County Jail. Witness," &c.

At the time when this consent-decree was made no witnesses had been examined in court, but several witnesses had been examined *de bene esse* on behalf of the defendants.

On the 5th of March 1870, *Anstey*, on behalf of the defendants, obtained a rule *nisi* to set aside the consent-decree of the 7th of January, on the ground that it had been obtained by fraud, and without the consent of the defendants.

The affidavit of the defendants Gopáldás Gurúbakshdás and Mándás Gurúbakshdás stated that Messrs. Macfarlane and Green were the defendants' attorneys in the suit; that the deponents, after the filing of the suit, had been put in jail by the plaintiff, in consequence of their not having paid the plaintiff's costs in the Ecclesiastical proceedings; that when in jail one Viṭhal Kalyán had come to them and told them that Náná Ánandráv, a clerk of Messrs. Macfarlane and Green, Gomá Harnáth, and Jorá Sálá had proposed to him, Viṭhal, that if the defendants would consent to a reference of all matters in dispute in the suit to them, Náná, Gomá, and Jorá, and to him, Viṭhal, the plaintiff would get the deponents released from jail; that they consented to refer the suit, and a consent-paper, to the effect that "whatever Viṭhal, Gomá, and Náná should do for settlement of the matter in dispute would be consented to by the deponents," was subsequently drawn up by Viṭhal and signed by the deponents, for themselves and the other defendants; that the deponents had no authority from the other defendants to sign for them, and that on hearing of the consent-decree they instructed their attorney, Mr. Pestanji Dinshá, to write to the plaintiff and repudiate the decree, as obtained by fraud and without the knowledge and consent of the defendants.

The other three defendants made a joint affidavit, in which they stated that they had no knowledge of the reference-paper signed by the other two defendants, or of the circumstances connected with it, and that they had not authorised the other two defendants to sign any such paper on their behalf; that they had heard that the suit had come on for hearing on the 7th of January, and that a consent-decree was made in

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'it, but that they never consented to the decree or the terms of it, and that the decree had been obtained by fraud.

Vithal Kalyán made an affidavit confirming that of the first two defendants.

When the rule *nisi* was granted, it was directed that a copy of it, and of the affidavits on which it had been obtained, should be served upon Messrs. Macfarlane and Green.

The plaintiff made an affidavit in answer, denying that he was a party to the alleged fraud, and stating that two of the defendants, Baldevdás Govardhandás and Premdas Gurúbakshdás, with Vithal Kalyán and Gomá Harnáth, were present in court when the consent-decree was obtained, and that these two defendants and Rámdás Govardhandás had subsequently acted in accordance with the terms of the decree, by quitting the *gurúdvár*, and taking up their residence in the *chál*, &c.

Mr. Macfarlane also made an affidavit, in which he stated that he and his clerk Náná had seen the three defendants who were not in jail, and had advised them to settle with the plaintiff, and that Náná explained to them the terms on which the plaintiff was willing to settle, which were subsequently embodied in the consent-decree, and that the said defendants consented to these terms; that he sent his clerk Náná to the jail to see the defendants, who were in confinement, and explain to them the proposed terms of settlement, and obtain their authority to settle. Náná confirmed this statement, and said that he saw the two defendants who were confined in jail, explained to them fully the terms on which the plaintiff was willing to settle, to which they agreed; that he subsequently obtained from them a paper which purported, and which he then believed, to be signed by all the defendants except Baldevdás.

The following is a translation of the paper :—

"JAGANNA'TH..... *Plaintiff.*

GOPA'LDA'S GURU'BAKSHDA'S, &c..... *Defendants.*

We, the undersigned, in respect of the above suit, (give in writing to) Parbhu Nánábhái Anandráv, and Vithal Kalyán and Gomá Harnáth (as follows):—The above plaintiff is willing to settle. Consequently, should

you three persons settle on our behalf in any manner whatever, the same is approved of, and binding on us and our heirs and representatives. You three persons are under no risk in respect thereof in any way whatever. Whatever you may do is (to be held) as done by ourselves. 5th January 1870.

(Signed) GOPA'LDA'S GURU'BAKSHDA'S.
„ MA'NDA'S GURU'BAKSHDA'S.
„ PREMDA'S GURU'BAKSHDA'S.
„ RA'MDA'S GURU'BAKSHDA'S."

There were several other lengthy affidavits filed on either side.

The rule came on for argument before WESTROPP, C.J.

Latham, for the plaintiff, showed cause.

McCulloch appeared for Messrs. Macfarlane and Green.

Anstey supported the rule.

Cur. adv. vult.

4th July 1870. WESTROPP, C.J. (after stating the facts of the case, said) :—The case has a double aspect, involving as it does two questions of a somewhat different nature—(I.) whether the consent-decree of the 7th of January is binding upon the defendants as against the plaintiff, and (II.) whether it is binding as between the defendants and their attorneys, Messrs. Macfarlane and Green. The first question is directly in issue upon this motion, and although I cannot now decide the second, I will, with a view to prevent further litigation, express my opinion upon it. Assuming for the present that the defendants did not know of, or did not consent to, the decree that has been made, I am, for the following reasons, of opinion that as between the defendnats and the plaintiff the former are bound by its terms, and cannot now set it aside.

The case of *Swinfen* v. *Swinfen* (*a*) was much relied on in the argument for the defendants. The circumstances of that case were very peculiar. It was a suit for the specific performance of an agreement of compromise which had been entered into by the counsel for the plaintiff against her expressed wishes, and without the consent of her attorney.

(*a*) 27 L. J. Ch. 35, 491.

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The Master of the Rolls, Sir John Romilly, refused to compel a specific performance of the agreement, and dismissed the bill. In doing so he expressed his opinion that an attorney had not power to bind his client by a compromise entered into without that client's authority, but his opinion has not been approved by the Common Law Judges; and in suits for a specific performance of an agreement it must be remembered that Courts of Equity have a discretion vested in them as to whether they will compel a party specifically to perform an agreement or not, and in exercising such discretion will consider whether, under all the circumstances, it will be equitable to grant such relief; and in that case the Master of the Rolls was of opinion that it would be inequitable to compel Mrs. Swinfen to specifically carry out an agreement which was entered into against her positive instructions.

Before that bill had been filed in Equity, the same question had come before the Court of Common Pleas on a rule calling upon Mrs. Swinfen to show cause why an attachment should not be issued against her for disobedience of a rule of court that had been drawn up in accordance with the agreement of compromise (*b*). That rule was discharged upon a technical point, but Mr. Justice Cresswell and Mr. Justice Willes were strongly of opinion that the compromise was binding upon Mrs. Swinfen, and from that view the remaining Judge, Mr. Justice Williams, did not dissent. Cresswell, J., there said: "It is said that the compromise which was entered into by the counsel for the respective parties at Stafford was without the authority or consent of Mrs. Swinfen, the plaintiff. I think the court cannot for a moment listen to an objection of that sort, and I am glad to find there is abundant authority for our holding that the client is absolutely and conclusively bound by what the counsel on her behalf assented to. I think it would be most fatal to the due administration of justice if we were to allow the authority of counsel to be thus questioned. And there is not any hardship or inconvenience in this; for if the client

(*b*) *Swinfen* v. *Swinfen*, 18 C. B. 485.

or the attorney has reason to think that the counsel is taking a course that will prejudice his interest, he may withdraw his brief, and so put an end to his authority to represent the client before the court. But if counsel duly instructed take upon himself to consent to a compromise which he, in the exercise of a sound discretion, judges to be for the interest of his client, the court will not inquire into the existence or the extent of his authority. I am extremely happy to find that the decisions abundantly bear us out in thinking this objection cannot be permitted to prevail." The rule in that case was discharged, as there was no proof before the court that its process had been disobeyed by Mrs. Swinfen. The next report of the case is in Vol. I. of the Common Bench Reports, N. S., at page 364. After the first rule had been discharged, a new rule was obtained upon affidavits which stated that a demand to comply with the rule of court had been made on Mrs. Swinfen, and that she refused to comply with it. The Judges on that occasion were Cresswell, J., Williams, J., and Crowder, J. The two former did not withdraw from the views they had expressed on the former occasion, but, as Crowder, J., was of a different opinion, the rule for an attachment was discharged, as the court thought that it was impossible for it to treat the plaintiff as guilty of contempt for refusing to perform an agreement by which one member of the court thought she was not bound. So that, so far as the opinion of the majority of the Judges of the Common Pleas is concerned, there is nothing in that case to support the argument of the defendants' counsel. It is true that the Master of the Rolls was of a different opinion, but his opinion has not since been acquiesced in by the Common Law Judges at least.

The first case in point of date after *Swinfen* v. *Swinfen* was *Chambers* v. *Mason* (*c*), decided in 1858. In that case it was held that where a cause is compromised by the counsel and attorneys in court in the presence of the client, and after conference had with him with a view to an arrangement, and the client does not dissent, and the terms of the

(*c*) 5 C. B. N. S. 59.

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compromise have been embodied in an order of *Nisi Prius*, subsequently made a rule of court, the arrangement will not be disturbed upon a suggestion by the client that, *though present* when it was made, he did not understand what was going on. Willes, J., after delivering the judgment of the court (Crowder, Willes, and Byles, JJ.) to that effect, said: "For my brother Byles and myself, I have to add that we also are prepared to give judgment for discharging the rule with costs, upon the ground that, according to the expressions expressed by the majority of the court in *Swinfen* v. *Swinfen*, 18 C. B. 485 and I. C. B. N. S. 364, the authority of counsel to make the compromise ought not to be inquired into in this proceeding *between the parties*."

In *Fray* v. *Voules* (*d*) the question arose between a client and his attorney, and not between the plaintiff and defendant. It was there held that an attorney was not justified in entering into a compromise against the express directions of his client, although the compromise was for the benefit of the client; but the inference, from what Lord Campbell, C. J., there says, is that the compromise would have been binding, notwithstanding such directions, as between the parties.

Chown v. *Parrott* (*e*) was also an action against an attorney by his client, and it was held that an attorney, retained to defend an action, is not guilty of actionable negligence if he enters into a compromise without the consent of his client, provided he acts *bonâ fide* and with reasonable care and skill, and the compromise is for the benefit of the client, and is not made in defiance of his express prohibition. Now if that be good law between attorney and client, *à fortiori* it is binding between the plaintiff and defendant. I do not mean it to be understood that I am of opinion that the compromise would be binding if the opposite party were aware that his opponents refused to consent to the arrangement; but nothing of that sort is alleged here. The general doctrine is laid down by Erle, C.J.: "I apprehend," he says, "the rule of law is well established that the general authority to conduct a cause gives

(*d*) El. & El. 839. (*e*) 14 C. B. N. S. 74.

the attorney authority to compromise. The reason why the compromise is held to be binding upon the client is because the attorney is his general agent for that purpose. I think that is well established by *Fray* v. *Voules*, 1 Ellis and Ellis 839, where it was held that an attorney who makes a compromise in defiance of the express directions of his client not to do so is guilty of a breach of duty." Willes, Byles, and Keating, JJ., express similar opinions, and Keating, J., says: "Attorneys must of necessity, in the absence of express instructions to the contrary, have the authority alleged, which, I think, affords a complete defence to the charge of negligence; though it may be that the general authority of the attorney may be limited by express instructions."

The next case is that of *Prestwich* v. *Poley* (*f*). That goes further than the others, and extends the attorney's authority to his managing clerk. The marginal note is to the effect that an attorney has a general authority to compromise an action on behalf of his client, provided he act *bonâ fide* and reasonably, and not in defiance of the direct and positive instructions of the client; and this authority seems to extend to a managing clerk having the general management of the business. That was an action brought to recover the price of a piano, and the plaintiff's attorney settled the action on the terms of the defendant agreeing to return the piano and pay a certain sum for costs. The plaintiff repudiated the agreement, and gave notice of trial. It was held that the plaintiff was bound by the compromise. In delivering judgment, Erle, C.J., after referring to the facts, says: "I do not limit my judgment to the consideration of the question as between the parties. It is clear that there was no express prohibition to the attorney to compromise, and the question for us to determine is whether the general retainer as attorney gave authority to compromise the action in this way. It is conceded that the attorney on the record has a general control and authority over the procedure in the action, and that it is competent to him to settle the action by taking a less sum than that demanded by the plaintiff. But it is said he has no

(*f*) 18 C. B. N. S. 806.

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authority to take goods for money. I do not see why he should not. If the cause had proceeded to its natural result —to judgment and a writ of *fi. fa.*—for aught I know, the sheriff might have taken this very piano in execution. I am unable, therefore, to say that the plaintiff's attorney has in any respect gone out of the ordinary and proper course of his duty in the arrangement he has effected." The Chief Justice then refers to some cases, and comments on *Swinfen* v. *Swinfen*. "That case," he says, "was remarkable in all its circumstances, and in the course of litigation to which it gave rise. It can hardly be referred to as a decision which is to afford a guide in any case not similarly circumstanced. The judgment of the Master of the Rolls went very much upon the ground of the extraordinary departure from the usual course of events on the trial of an issue directed to inform the conscience of the Court of Chancery. They are, to my mind, to be considered as applicable only to the peculiar state of facts disclosed throughout every stage of that eventful case." And Keating, J., explains the case of *Swinfen* v. *Swinfen*. He says: "I may take this opportunity of saying that that case, so far as the decision in this court is concerned, has not been fully understood, because not only the three Judges (18 C. B. 485) adhered to the opinion they there expressed, but, further, the motion which was afterwards refused was for an attachment for disobeying a rule of court. The opinions of the majority were not allowed to prevail, because it was thought, and properly, that if one member of the court entertained a doubt, it was not a case for the summary coercive power of the Court. In the Court of Chancery the case of *Swinfen* v. *Swinfen* was treated as resting on very peculiar grounds."

The last case to which I shall refer is *Butler* v. *Knight* (*g*), which carries the law one step further. It was held there that if in an action the plaintiff continues the authority of his attorney after judgment, by allowing him to proceed to obtain satisfaction, the attorney retains the power to bind his client by a compromise. There the attorney of the

(*g*) Law Rep. 2 Ex. 109.

plaintiff, contrary to her instructions, after verdict, compromised the claim; and Kelly, C.B., says: "If the plaintiff attempted to enforce her judgment against Ruffe (the execution-creditor), or brought an action on that judgment, Ruffe might safely plead the compromise with her through the medium of her attorney, or apply to the court on this ground to stay proceedings."

Now to apply the law to the present case. If Mr. Macfarlane was not authorised by the defendants to enter into this arrangement; if the authority conferred by the so-called reference-paper was an authority to refer only, and not to settle; if even he were directed not to settle, there is nothing to show that the plaintiff knew of this; and, the plaintiff being ignorant of the want of authority on the part of Mr. Macfarlane, I hold that the compromise was binding between the plaintiff and the defendants.

His Lordship then expressed his opinion on the second question, to the effect that, as a matter of fact, Mr. Macfarlane had authority from the defendants to consent to the decree, and that they were swearing falsely when they stated that it was made without their knowledge; that the terms of the compromise were fully explained to them; that that compromise was a reasonable and proper one; that the so-called reference-paper was an authority to settle, and not to refer to arbitration; and that two of the defendants were in court when the decree was made. The rule was, accordingly, discharged. The costs of the plaintiff were ordered to be paid by the defendants.

Rule discharged with costs.

Attorneys for the applicants: *Pestanji & Ghándibhái.*

Attorneys for the plaintiff: *Dallas & Lynch.*

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Suit No. 1027 *of* 1867.

VINA'YAKRA'V GANPATRA'V *et al.* .....*Plaintiffs.*

RANSORDA'S PRA'NJIVANDA'S .....*Defendant.*

Agreement—Consideration—Servant inducing his Master to employ particular Broker—Percentage—Sucri—*Public Policy.*

Where a *mehtá*, without the knowledge of his master, agreed with his master's brokers to receive a percentage (called *sucri*) on the brokerage earned by such brokers in respect of transactions carried out through them by the *mehtá's* master, and no express consideration was alleged or proved by the *mehtá*, the court refused to imply, as a consideration, an agreement by the *mehtá* to induce his master to carry on business through such brokers, and was of opinion that such an agreement would be inconsistent with the relation of master and servant.

But where the same brokers agreed with the *mehtá* not to charge him brokerage on such private transactions as he should carry on through them, and the *mehtá* carried on private transactions through the brokers, *it was held* that the brokers were bound by that agreement, and could not maintain a claim for such brokerage.

THE plaintiffs, Vináyakráv Gaṇpatráv, Gopálráv Gaṇpatráv, and Mukundráv Gaṇpatráv, who carried on business in Bombay by their *munim*, Balvantráv Bhikáji, under the name of Gaṇesh Vináyak, brought this suit to recover Rs. 10,000 and interest thereon, due under a document in the following form:—

"To Rájá Shrí Ganesh Vináyak, written by Shá Ransordás Pránjivandás, whose salutation, &c.

To wit: Ten thousand rupees in ready cash have been received from you on personal security. Therefore this acknowledgment is written and delivered, Sunday, the 12th of Posh Shudh of Samvat 1921 (8th January 1865). My own handwriting.

(Signed) RANSORDA'S PRA'NJIVANDA'S."

The defendant put in a written statement in which he claimed a set-off from the plaintiffs exceeding the amount of the claim of the plaintiffs.

The 4th para. of the written statement alleged that the defendant employed the plaintiffs as his agents in the sale and purchase of cotton and opium for different *vaidas*, and that the plaintiffs had sent in an account thereof to the defendant, showing a balance in favour of the defendant, and

that, *in addition to such balance,* the defendant claimed credit for Rs. 314-4-9 for remission of commission and discount in brokerage, to which he was entitled, as it had been expressly agreed that no commission should be charged to the defendant, and that he should be allowed the discount deducted by the plaintiffs from the brokerage paid on his account.

This remission formed one item of the defendant's set-off. The defendant also claimed other similar remissions. The 8th para. of the written statement alleged that the defendant was the *mehtá* of Rustamji Jamsetji Jijibhái, who carried on large *vaida* transactions through the plaintiffs, and it was agreed between the plaintiffs and the defendant that the plaintiffs should allow the defendant ten per cent. of the commission they charged Rustamji Jamsetji Jijibhái, and that the plaintiffs had given the defendant credit for this commission on the *vaida* of Mágsar of Saṁvat 1921, but had not given him credit for commission on other transactions for the *vaida* of Vaisák of that year, amounting to Rs. 2,801-12-9. This formed another item of the defendant's set-off.

On this written statement being filed, the plaintiffs obtained leave to amend their plaint by giving credit to the defendant for such sums as they admitted they owed to the defendant.

This they did, giving credit to the defendant for Rs. 4,252-3-9, and the accounts were referred to the Commissioner.

The Commissioner made his report on the 25th of June 1870, and therein gave credit to the defendant for a commission of ten per cent. upon the commission earned by the plaintiffs in respect of the transactions entered into by Rustamji Jamsetji Jijibhái through the plaintiffs, amounting to Rs. 2,801-12-9; and also for remission of commission on the defendant's own cotton transactions for the *vaida* of Saṁvat 1921, amounting to Rs. 1,271-2-0.

This report the plaintiffs gave notice of motion to vary, by disallowing the above items, and the motion came on before WESTROPP, C.J., on the 14th of July 1870.

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The Honorable A. R. Scoble (Acting Advocate General) (with him *McCulloch*), for the plaintiffs, contended that there was no consideration to support the agreements under which these items had been allowed, and that the agreements themselves were not proved.

Mayhew (with him *Starling*) *contra.*

Cur. adv. vult.

July 16. WESTROPP, C.J.:—This is a very peculiar case, which came before the court on what was substantially a motion that the Commissioner should be directed to review his report.

The action was brought to recover the sum of Rs. 10,000 and interest thereon, due from the defendant to the plaintiffs on an acknowledgment in writing by the defendant that he had received from the plaintiffs that sum on personal security, thereby showing that the transaction was one of loan; and that such was its character is not denied in the written statement filed by the defendant. There is manifestly no truth in the gloss which subsequently the defendant has tried to put upon the transaction as to the Rs. 10,000 in his evidence. The defence put forward by him in his written statement was simply that he was entitled to set off against the claim of the plaintiffs certain sums mentioned in the account he annexed to that written statement. On the validity of that set-off the Commissioner had to decide when the account was referred to him. Two items of the account are disputed by the plaintiffs. One of these was in respect of a commission on brokerage, which the defendant said he was entitled to receive from the plaintiffs. The other item was in respect of brokerage which had been charged to him on certain transactions carried on for him by the plaintiffs, and which latter brokerage the defendant alleged that the plaintiffs were not justified in so charging.

The first of these items of set-off the defendant claimed in respect of certain transactions carried on by his master, Rustamji Jamsetji Jijibhái, in the *saṭṭá* bazár, through the

plaintiffs as brokers. He thus puts forward his claim in his written statement:—"The defendant was the *mehtá* of Rustamji Jamsetji Jijibhái, who carried on large *vaida* transactions through the plaintiffs, and it was agreed between the plaintiffs and the defendant that they should allow him ten per cent. of the commission they charged Rustamji Jamsetji Jijibhái. The plaintiffs have given the defendant credit for this commission on the *vaida* of Mágsar of Saṁvat 1921, but have not given him credit for commission on the other transactions for the *vaida* of Vaisák of that year, which amounts to Rs. 2,801-12-9."

It does appear that the plaintiffs have given certain credits to the defendant in respect of *sucri* on the transactions of Rustamji Jamsetji Jijibhái, carried on by the plaintiffs as his brokers and shroffs, in the *vaidas* of 1920. The mere fact that the plaintiffs have on some occasions allowed such credits to the defendant will not entitle him to demand further allowances of the same nature, if the previous allowances were purely voluntary on the part of the plaintiffs, or for such a consideration as a Court of Justice cannot properly sanction.

The word "*sucri*" is rendered "present" by the Translator, its more literal interpretation being "sweetmeats." I have never before known a claim of this kind to be made in court. The defendant does not contend that he was employed as a broker in the transactions between the plaintiffs and his master, Rustamji Jamsetji Jijibhái. The defendant was the *mehtá, i.e.*, clerk, of Rustamji—in fact his servant, and as his servant he says he was to get from the plaintiffs a commission of ten per cent. on all *vaida* transactions (time-bargains) carried out for Rustamji by the plaintiffs; and it is not alleged that this agreement was known to or sanctioned by Rustamji. There is no allegation in the written statement, nor is there in the evidence anything to show, that in consideration of this commission the defendant was to do anything; so that, so far as positive statement goes, there is a total absence as well of allegation as of proof of consideration for the agreement. Is there any implied consideration

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for it, or if there be such a consideration implied, as was suggested in argument for the defendant, namely, that of inducing Rustamji to employ the plaintiffs, of keeping Rustamji in good humour with the plaintiffs, is it a valid one, Rustamji not knowing of the agreement? I think it is not. To support such an agreement would be against the policy which should regulate the relation of master and servant, and would be subversive of that relation, as such an arrangement would render it the interest of the servant to connive at conduct of the parties with whom his master deals, which the servant ought to be vigilant to expose and to check. It is true that these were *saṭṭá* transactions, which were carried on by the plaintiffs for Rustamji Jamsetji Jijibhái, and, as such, might not perhaps afford many opportunities to the defendant of assisting the plaintiffs to impose upon his master; but if the Court were to allow such a claim as this in *saṭṭá* transactions, on what principle could it refuse to allow a similar claim in other and more legitimate transactions? Could any one contend that the butler of a gentleman here or in London could maintain a suit against a tradesman for a percentage on his master's purchases, supposing an agreement to that effect? It would be against all policy; it would place the servant in a position inconsistent with the duty which he owes to his master. It would lead him to pass over unfair and dishonest acts on the part of the tradesman. If the Court were to treat the suggested consideration in this case as a good consideration, it would be lending its sanction to a very dangerous doctrine. I think that this claim of the defendant is unsustainable: 1*st*, because there has not been any consideration for it proved; and, 2*ndly*, because the Court is not, in my opinion, at liberty to imply the only consideration which has been suggested.

Then as to the second item, I feel much difficulty as to whether there was such an agreement made as the defendant alleges. However, although the evidence of it is very unsatisfactory, and I doubt if I should have held it proved, if the matter had been submitted to me in the first instance,

yet I am not so far certain that the evidence is insufficient as to induce me to set aside the decision that the Commissioner, Mr. Fox, has made. [His Lordship here reviewed the evidence on this point, and proceeded.] Assuming, then, that the agreement was made, is it a valid one? It is possible that the defendant would not have entered into these *saṭṭá* transactions on his own account if the plaintiffs had not promised to conduct them for him free of charge, and the defendant has sworn that he did enter into them for that reason. He says: "As to transactions which I might carry on, on my own account, through the plaintiffs, he, Balvantráv (the *munim* of the plaintiffs' firm), said he would not charge commission; as he voluntarily said this, I carried on transactions through him." So that it is not only probable that such was the reason, but it is affirmed by the defendant to have been so; and the plaintiffs, through their *munim*, having promised the defendant not to make the usual charge, and having thereby induced the defendant to enter into these transactions, I do not think they are now at liberty to turn round upon the defendant and to charge him with brokerage. On the other hand, if the plaintiffs had, notwithstanding their promise, declined to effect these *saṭṭá* bargains for the defendant, he could not have maintained any action for the breach of that promise. These transactions having been entered into before Bombay Act III. of 1865 passed, it must be allowed that the brokerage upon them could be recovered, if there were not an agreement to the contrary. That this is so was decided in the case of *Jorávarmal Sivlál* v. *Dádábhái Byrámji*, by Sir Matthew Sausse, C.J., and not only that brokerage was recoverable, but also moneys paid by shroffs and others in settlement of such contracts on behalf of their principals. That case was argued on the 12th of April 1859, and judgment was given on the 14th of the same month, and the law has ever since been held to have been in accordance with that judgment. It was for the purpose of altering the law in those respects that Bombay Act III. of 1865 was passed, but it is not retrospective. So that these charges for brokerage would have been

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lawful, being before July 1865; but the plaintiffs having agreed not to charge, I must hold that they cannot turn round and say they will now make the charge, after having induced the defendant by their conduct to act as he did.

Under these circumstances, the usual direction to give would be that the case should go back to the Master, with a direction to him to review his report in accordance with this judgment; but, if the parties consent, I will at once, in order to save expense, make a decree for the amount which may be found due after disposing of the disputed items of set-off in accordance with the principles which I have laid down; such amount to be agreed on by the parties, without prejudice to their right to appeal on the questions submitted to me. *

Attorneys for the plaintiffs: *Dallas & Co.*

Attorney for the defendant: *C. Tyabji.*

* NOTE BY EDITOR.—The sum of Rs. 7,300-15-6 was agreed upon as the amount of the decree, on the basis laid down in the above judgment, and there has not been any appeal against that judgment.

Original Suit No. 442 of 1870. 1870. July 19.

RA'JA'RA'M GOVINDRA'M and NA'RANDA'S MULCHAND .....*Plaintiffs.*

M. B. BROWN, M. DONALD, and KARSANDA'S MA'DHAVDA'S .....*Defendants.*

Bills of Lading fraudulently signed—Indorsees of Bills of Lading for Value—Mate's Receipts held by unpaid Vendors of Goods shipped—Injunction—Title—Summons—Service—Civ. Proc. Code, Sec. 17.

The plaintiffs agreed with the defendant K. M. to purchase and ship cotton on account of K. M., and to retain the mate's receipts for the cotton so shipped until the purchase-money should be paid by K. M.

Under this agreement the plaintiffs shipped 609 bales on board the "Teresa." Before the greater part of the 609 bales had been shipped, and before paying for the same, K. M., without production of the mate's receipts, induced the master of the ship to sign bills of lading for the said 609 bales, and indorsed over the bills of lading for 310 of such bales to J. C. and Co., *bonâ fide* indorsees for value, without notice.

In a contest between the plaintiffs, holders of the mate's receipts, and J. C. & Co., indorsees for value of the bills of lading of the said 310 bales, it was held that the plaintiffs were entitled to the possession of the 310 bales, to the exclusion of J. C. & Co.

Service of a summons on an agent to whom a ship is consigned is good service on the owner in respect of matters connected with such ship.

THE plaint in this case stated that the plaintiffs, on or about the 9th of May 1870, agreed with the defendant Karsandás Mádhavdás to buy for him, in the name of the plaintiffs, 3,000 bales of cotton, and to press and ship the same on board such ship or ships as Karsandás Mádhavdás should direct, upon condition, amongst other things, that the plaintiffs should take the mate's receipts for the bales, and keep the receipts until Karsandás Mádhavdás should pay the plaintiffs for the 3,000 bales, with commission (2 per cent.) and Rs. 3-12-0 per bale for pressing and *mukádam* charges; that the plaintiffs bought 609 bales in accordance with the agreement, and caused them to be pressed, and shipped on board the "Teresa," of which the defendant Brown was master, and the defendant Donald was owner, and took the mate's receipts for the 609 bales; that there was due to the plaintiffs, for purchase-money, commission, &c., Rs. 94,354, and that the plaintiffs had tendered the mate's receipts to

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Karsandás Mádhavdás, and requested him to pay the said sum, but that Karsandás Mádhavdás had not paid the same, and was in insolvent circumstances; that, according to the custom of the port of Bombay, the master of the ship was bound to deliver bills of lading for the said 609 bales to the holder of the mate's receipts, and to no other person, yet that he, on the 4th of June 1870, before any of the bales had been put on board, fraudulently signed bills of lading purporting to be in respect of the said 609 bales, and delivered the bills of lading to Karsandás Mádhavdás, and refused to give the bills of lading to the plaintiffs as holders of the mate's receipts.

The mate's receipts held by the plaintiffs were seven in number, in the usual form :—"Received on board the ship 'Teresa,' bound for Liverpool from Bombay, the following packages, in good order and condition" :—(Here follows description.)

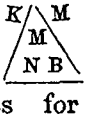
(Signed) "C. F., Commanding Officer."

The first (dated June 6th, 1870) was for 90 bales marked

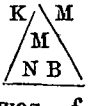
The second (dated June 7th) was for 56 bales marked

and for 19 bales marked

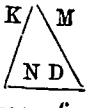
The third (dated June 9th) was for 91 bales marked

and for 60 bales marked 

The fourth (dated June 13th) was for 41 bales marked

and for 60 bales marked 

The fifth (dated June 16th) was for 49 bales marked

and for 3 bales marked 

The sixth (dated June 14th) was for 100 bales marked

The seventh (dated June 14th) was for 100 bales marked

The first three receipts did not mention the name of any shipper. In the fourth the bales purported to be shipped by Karsandás Mádhavdás, in the fifth by Mulchand (one of the plaintiffs), in the sixth and seventh by Hirjibhái Sorábji.

The boat-notes, which did not materially differ from the mate's receipts, were produced at the hearing. Their contents are set out in the judgment.

The plaintiffs sought to recover possession of the 609 bales, and damages, Rs. 6,000, for their detention.

Upon affidavit affirming the truth of the matters stated in the plaint, and averring that bills of lading in respect of the 609 bales had been presented to the master, which he had refused to sign, and that the "Teresa" was nearly ready to sail, and that it was apprehended that if the "Teresa" left the harbour of Bombay the defendant Brown would remove from the jurisdiction of the court the goods sought to be recovered in the suit, and would thereby defeat the execution of any decree that might be passed against him, *McCulloch*, on the 4th of July 1870, obtained a rule calling upon the defendants to show cause why an injunction should not issue restraining them and each of them, their servants, &c., from wasting, damaging, or removing out of the jurisdiction of the court, the abovementioned 609 bales of cotton, and why a manager should not be appointed to take possession and have custody of the said bales. An injunction was also granted *ad interim*. None of the original defendants showed cause against the rule, but when, on the 14th of July 1870, on behalf of the plaintiffs, *McCulloch* moved to make the rule absolute, *Anstey*, on behalf of Jefferson, Campbell, & Co., applied to be allowed to intervene, upon the grounds stated in an affidavit of Joseph Jefferson, one of the partners in that firm. From that affidavit it appeared that Karsandás Mádhavdás, on the 7th of June 1870, had consigned 500 bales of cotton

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marked by the "Teresa" to Jefferson's firm in London for sale in England, and had drawn a bill of exchange for £6,000 against the shipment on that firm, and had indorsed to Jefferson's Bombay firm bills of lading signed by the defendant Brown, some bearing the above mark, and all dated the 7th of June, and had handed to Jefferson policies of insurance and a letter of hypothecation in respect of the said 500 bales. On these documents Jefferson, Campbell, & Co. had advanced to Karsandás Mádhavdás Rs. 60,000, in good faith, in the ordinary course of business, and without any notice of any claim upon the bales of any person other than Karsandás Mádhavdás. Jefferson, Campbell, & Co. indorsed the documents to the Chartered Bank of India, Australia, and China, for value. Mr. Jefferson stated that his English firm would accept and pay the bills drawn upon them, and would then receive the shipping documents, and that he believed that the 500 bales for which the documents had been given to him were part of the 609 bales mentioned in the plaint.

Mr. Jefferson's affidavit then stated that the price of the 609 bales would be about Rs. 80,000, and that, from information received, he believed that the plaintiffs had received from Karsandás Mádhavdás Rs. 1,50,000 between the 19th of May and the 14th of June 1870, which would be about the price of 1,100 bales, and that from the time the shipment of the said cotton commenced in the "Teresa" Karsandás Mádhavdás paid to the plaintiffs Rs. 82,000, and that Rs. 30,000 paid by Jefferson, Campbell, & Co. to Karsandás Mádhavdás were on the same day paid by him to the plaintiffs, and that the plaintiffs were aware that Karsandás Mádhavdás obtained advances on the cotton, and that they were being paid out of such advances. The affidavit further denied the custom set up in the plaint, and (from information) that the bills of lading were signed before the goods had been put on board.

Nárandás Mulchand made an affidavit in reply explaining the manner in which Karsandás Mádhavdás was indebted to

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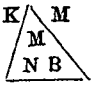
the plaintiffs, on account of the cotton purchased by them under the agreement mentioned in the plaint, and showing that the 609 bales on board the "Teresa" had not been paid for: and denying that the plaintiffs were aware of the source from which the moneys paid to them from time to time by Karsandás Mádhavdás were derived. He further stated that the bill of lading held by Jefferson, Campbell, and Co. was dated the 4th, and not the 7th, of June, and showed that it must have been signed before the goods to which it purported to refer were put on board.

In addition to the 609 bales in respect of which the suit was brought, 600 other bales had been shipped by the plaintiffs on the "Teresa," under the agreement referred to in the plaint, but for them the plaintiffs had been paid, and the mate's receipts handed to Karsandás Mádhavdás. Of these 600 bales, 190 were marked 

Anstey and *Latham* then, on behalf of Jefferson, Campbell, and Co., showed cause against the rule obtained on the 4th of July, and contended that, under the circumstances, the *bonâ fide* indorsees of the bills of lading were entitled to the bales comprised in them as against the holders of the mate's receipts, and cited Abbott on Shipping, p. 387, 11th ed.; *Schuster* v. *McKellar* (*a*); *Coventry* v. *Gladstone* (*b*); *Cowasjee* v. *Thompson* (*c*); *The Marie Joseph* (*d*); *Bristow* v. *Whitemore* (*e*); that, as there was no prayer for an injunction in the plaint, none could be granted: *Savory* v. *Dyer* (*f*); *Wright* v. *Atkyns* (*g*); that the property in the goods had passed from the plaintiffs: "*The Argentina*" (*h*); *Cuming* v. *Brown* (*i*); *Gurney* v. *Behrend* (*j*); that the demand for the goods was not made in proper time: *Tindall* v. *Taylor* (*k*); that the fraud practised by Karsandás Mádhavdás did not affect Jefferson, Campbell, and Co.'s title to the goods: *White* v.

(*a*) 7 El. & B. 704. (*b*) Law Rep. 6 Eq. Ca. 44.
(*c*) 5 Moo. P. C. C. 165—177. (*d*) Law Rep. I. P. C. App. 219.
(*e*) 28 L. J. Ch. 801. (*f*) Ambler.
(*g*) I. Ves. & B. 313. (*h*) Law Rep. I. Adm. 370.
(*i*) 9 East. 506. (*j*) 3 El. & B. 622. (*k*) 4 El. & B. 219.

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Garden (*l*), followed in *Kingsford* v. *Merry* (*m*); and that, considering the inconvenience that would be caused to third parties, the court should not grant the injunction: *Child* v. *Douglas* (*n*); *Goodhart* v. *Lowe* (*o*).

McCulloch, in reply, cited *Grant* v. *Norway* (*p*); *Craven* v. *Ryder* (*q*); *Thompson* v. *Trail* (*r*); Abbott on Shipping, p. 402 (11th edn.).

Cur. adv. vult.

19th July 1870. GREEN, J. :—This suit is instituted by Rájárám Govindrám and another against M. B. Brown, the master, and one M. Donald, the owner, of the ship "Teresa," alleged to be residing in England and carrying on business by means of the firm of Messrs. Rennie, Scovell, & Co., of Bombay, and against one Karsandás Mádhavdás, and seeks to recover from the defendants possession of 609 bales of cotton which have been shipped on board the said vessel, or their value, and the sum of Rs. 6,000 as damages for their detention.

On the 4th instant an order was moved for by the plaintiffs, and granted, calling upon the then defendants to show cause why an injunction should not issue restraining them, their servants and agents, from wasting, damaging, alienating, or removing out of the jurisdiction of the court, the said 609 bales of cotton until the further order of the court, and also why a fit and proper person should not be appointed to take possession and have custody of the said bales of cotton until further order of the court; and it was ordered that in the meantime, or until the further order of the court, the defendants, their servants and agents, should be restrained from wasting, damaging, alienating, or removing out of the jurisdiction of the court, the said bales of cotton, or any part thereof.

On the 9th instant Mr. Scoble, Advocate General (with whom was Mr. Starling), appeared on behalf of Messrs. Rennie, Scovell, & Co., to protest against the service of the

(*l*) 10 C. B. 919. (*m*) 11 Exch. 577. (*n*) 5 DeG. M. & G. 739. (*o*) 2 Jac. & W. 349. (*p*) 10 C. B. 665. (*q*) 6 Taunt. 433. (*r*) 6 B. & C. 36.

summons and order to show cause on them, being held to be good service on the owner; but after argument I held that in the circumstances of the case, and on the facts disclosed in the affidavit of Mr. Thomas Wilson (the Bombay manager of the business of the firm of Rennie, Scovell, & Co.), the lastnamed firm did carry on business for and in the name of the owner, within the meaning of Sec. XVII., cl. 2, of the Civil Procedure Code, and that service on that firm of any summons or order in a matter connected with the business so carried on by them was a good service on the owner. The Advocate General was not instructed to accept the offer of the court to allow his clients time to communicate with the owners, and the case has proceeded without any appearance on the part of the master or owner, or of Messrs. Rennie, Scovell, & Co., except as watching the case.

On the 14th instant Mr. McCulloch (with whom was Mr. Ferguson) moved to make absolute the order of the 4th instant; and Mr. Anstey and Mr. Latham, on behalf of the firm of Messrs. Jefferson, Campbell, & Co., of Bombay, applied to intervene and be allowed to show cause against the order being made absolute, as having, or claiming to have, an interest in the bales of cotton in question in the suit, under bills of lading signed by the master, and indorsed to them for value by the defendant Karsandás Mádhavdás. I considered that they ought to be allowed to show cause, and that the proper mode of proceeding was to order that the firm of Messrs. Jefferson, Campbell, & Co. should be made parties (defendants) to the suit, under Sec. 73 of the Civil Procedure Code, and that the plaint should be amended accordingly, without prejudice to the *interim* injunction. This having been done, and a warrant to defend having been filed on the part of Messrs. Jefferson, Campbell, & Co., Mr. Anstey and Mr. Latham proceeded to show cause on their behalf, the other defendants, namely, the master, the owner, and Karsandás Mádhavdás, not appearing in person or by counsel.

Before considering the application to the present case of any of the various authorities which have been cited by counsel, it may be desirable to state the material facts which

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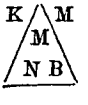
in my opinion, are to be deemed to be established at the present stage of the proceedings. The plaintiffs, in the month of May last, agreed with the defendant Karsandás Mádhavdás to buy for him, but in the plaintiffs' name, 3,000 bales of cotton, and to press and ship the same on board such ship or ships as Karsandás should direct, on the condition, amongst others, that the plaintiffs should take the mate's receipts, to be given on delivery on board of the cotton, and retain the same until Karsandás should pay for the cotton, with 2 per cent. commission, and Rs. 3½ per bale for pressing and *mukádam* charges. Subsequently to this agreement, the plaintiffs purchased up-country, at various places, 3,000 bales of cotton, and the same were sent down to them in Bombay. Of the cotton so purchased by the plaintiffs, 1,209 bales in all were shipped on board the "Teresa," and mate's receipts for the same delivered to the plaintiffs. For 600 of the 1,209 so shipped the plaintiffs have been paid by Karsandás, and have delivered to him the mate's receipts in respect of them, but in respect of the residue, namely, 609 bales, the plaintiffs have not been paid, and still hold the mate's receipts; and in respect of these bales the suit is brought. The 609 bales were received on board the "Teresa" under seven boat-notes (which have been produced on the part of Messrs. Jefferson, Campbell, and Co., and admitted by the plaintiffs), and which substantially agree with the mate's receipts produced by the plaintiffs, except that according to the boat-notes 613 bales appear to have been sent, according to the mate's receipts 609 only appear to have been received. It may be, the difference is to be accounted for by the fact that the condition of 4 bales was such that they were not received on board; but this is not very material. The boat-notes bear various dates, from the 4th to the 14th of June, and comprise, as I have said, 613 bales. Of these, 381 bearing the mark 

are mentioned as being "from Hirjibhái Sorábji;" 100 bearing the mark

and 79

bearing the mark as "from Karsandás Mádhavdás;" and 50 bearing the mark and 3 bearing the mark as "from Nárandás Mulchand" (the name of one of the plaintiffs). By the mate's receipts, also seven in number, and dated from 6th June to the 16th of June, 609 bales are acknowledged to have been received on board. As to 200 bales bearing the mark and 56 bearing the mark no name is mentioned in the receipts. As to 41 bales bearing the mark and 60 bales bearing the mark the name Karsandas Mádhavdás is mentioned in the receipt. As to 200 bearing the mark the name of Hirjibhái Sorábji is mentioned; and as to the residue of 52 bales (49 bearing the mark and 3 bearing the mark the name Mulchand (one of the names of one of the plaintiffs) is mentioned in the receipts. In respect of the price of the 609 bales so shipped, the plaintiffs claim from Karsandás Mádhavdás for unpaid purchase-money, with commission and charges, the sum of Rs. 94,354. The plaintiffs have tendered to the defendant Karsandás the said mate's receipts, and required him to pay the amount due, but he has not done so, and the plaintiffs allege that he is now insolvent and unable to pay his debts. On or about the 28th of June last,

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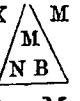
the plaintiffs having, it appears, heard a report that the master had signed bills of lading without any goods being shipped, and without any production of mate's receipts, called upon him to sign bills of lading to them in respect of the 609 bales, tendering the mate's receipts, but the captain refused to sign such bills, and after some further demand the plaintiffs instituted this suit.

The facts set up on the part of Messrs. Jefferson, Campbell, and Co. are that on the 7th of June the defendant Karsandás Mádhavdás consigned to their London firm through them 500 bales of cotton marked

drawing against the consignment, and indorsing to their Bombay firm a bill of lading for such cotton, bearing date, to the best of deponents' belief, the 7th of June; and that, on the security of such bill of lading and a policy of insurance and letter of hypothecation, the firm of Messrs. Jefferson, Campbell, and Co. advanced on the same day to the defendant Karsandás Mádhavdás Rs. 60,000, and all this in good faith in the ordinary course of business, and without any notice, direct or indirect, express or implied, of any claim of any person whomsoever other than Karsandás Mádhavdás to the said 500 bales of cotton. As to 109 of the bales claimed by the plaintiffs, the defendants Messrs. Jefferson, Campbell, and Co. do not advance any claim; and as 190 of the 600 bales shipped by the plaintiffs, and for which the plaintiffs have been paid by Karsandás Mádhavdás, bear the mark 

the mark mentioned in the bill of lading given to Messrs. Jefferson, Campbell, and Co., it may well be that to that extent there are now on board bales of cotton deliverable to the holder of the bill of lading in question over and above the 609 bales claimed by the plaintiffs. Indeed, for all that appears in evidence, it may be that, besides the 1,209 bales shipped by the plaintiffs, other bales bearing the mark

(which is said to denote "Karsandás

Mádhávdás, Machine-ginned New Broach") may have been shipped, and out of these, with the 190 bales bearing that mark which are in fact on board and to which the plaintiffs make no claim, the holders of the bill of lading may obtain delivery of their full quantity of 500 bales bearing that mark. But there is no evidence of the existence of such other bales, and I must, I think, assume at this stage of the proceedings that with respect to at least 310 bales marked

now on board the ship, the claims of the plaintiffs and of the holders of the bill of lading clash, and that one party or the other must be left to any remedy they may have against the master, or owner, or charterer of the ship.

Having stated the facts which, in my opinion, must be taken to be established, and are material to the present application, I proceed to consider some of the many cases which have been cited by counsel. Of these, three, namely, *The Argentina*, *The Marie Joseph*, and *Cowasjee* v. *Thompson*, are, in my opinion, distinguishable in their circumstances from the present, and do not bear so directly on the points in question as the three others, which I shall presently mention. In *The Argentina* (*ubi suprà*), the title of the assignee of a bill of lading to the goods represented by it is considered to be subject to two conditions; first, that he be *bonâ fide* assignee for value, without notice of fraud or insolvency of the purchaser; and, second, that the bills of lading (which in that case had been indorsed in blank by the shipper, and by him sent to an agent in England with instructions not to part with the same without first receiving payment) must be transferred by one having authority to do so; and it was held in the circumstances of the case that the agent had such authority. In *The Marie Joseph* (*ubi suprà*) the bills of lading had been indorsed by the shippers and consignors, and delivered by the consignors' agent in England to the purchaser on his acceptance of the bill of exchange drawn for the price. The bill of lading was subsequently, by arrangement, re-delivered to the consignors' agent as a

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security for the bill of exchange being paid, but the purchaser afterwards again got possession of it by a misrepresentation, and indorsed it to a creditor as security for money due by him (the purchaser) to such creditor. In this case it was held that, by the indorsement and original delivery of the bills, the purchaser had acquired complete property in the goods, and in virtue of such property had power to sell or pledge the goods, and that the title of the pledgee of the goods (*i.e.*, the creditor) ought to prevail against the unpaid vendor. In *Cowasjee* v. *Thompson* (*ubi suprà*), where the sellers held mate's receipts, but the master had signed bills of lading in the name of the purchaser, who became insolvent during the currency of the bill of exchange they had accepted, the ground of decision was that the goods had been completely delivered to the purchaser, and that after his acceptance of the bill the transaction was complete, and that the retention of the mate's receipts by the sellers was the result of a more oversight, or a fraud, and was wrongful, and could of itself confer no right or control over the goods.

The above three cases do not, in my opinion, govern the present one. In the present case the retention of the mate's receipts was intentional and rightful, and was done with the view of retaining control of the goods till payment was made for them; and the vendors and original owners of the goods were wholly strangers to the bill of lading, which was signed without their consent or knowledge.

Among the cases cited, I consider that the three which bear most directly on the present case are those of *Craven* v. *Ryder*, *Gurney* v. *Behrend*, and *Schuster* v. *McKellar*. In *Craven* v. *Ryder* the Court considered that to an action against the master of a ship for conversion of certain sugars which had been sold and shipped by the plaintiffs, they retaining the lighterman's receipts, it was no defence that the goods had been sold by the person who had purchased from the plaintiffs to a person who had paid the price to such purchasers, and that the defendant had signed a bill of lading in favour of such second vendee deliverable to his assign-

The Chief Justice says: "The practice is that the person who is in possession of the lighterman's receipt is the person entitled to the bill of lading, which ought to be given only to the holder of that receipt. Consequently, the holder of that receipt retains a control over the goods, at least until he has exchanged the receipt for the bill of lading." And, again, "French and Co. (the first vendees) might sell their right again, but the plaintiffs might refrain from delivering the goods, unless under such circumstances as would enable them to recall the goods if they saw the occasion. The plaintiffs refuse to deliver them except in exchange for this receipt. They know a bill of lading will be executed before the ship sails, and they know that the bill of lading ought regularly to be executed to themselves. French and Co. sell to Caldas (the second vendee). Caldas goes to the defendant (the master) and obtains the bill of lading of these goods, but the defendant signs that bill of lading to Caldas in his own wrong, for he ought not to have given the bill of lading but in exchange for the lighterman's note." In *Gurney* v. *Behrend* we find in the judgment of the court, delivered by Lord Chief Justice Campbell, the following passage:—"The *onus* lies on the plaintiffs to prove that they had become the owners. For this purpose it is not enough that they had become *bonâ fide* holders of the indorsed bill of lading for valuable consideration. A bill of lading is not, like a bill of exchange or promissory note, a negociable instrument which passes by mere delivery to a *bonâ fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent *bonâ fide* transferee for value cannot make title under it as against the shipper of the goods." In the case of *Schuster* v. *McKellar*, the plaintiffs, a London firm, had purchased abroad, on their own credit, goods for another firm (Coles Brothers), who in their own name engaged room for the goods in a ship in the port of London bound for

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Calcutta. The plaintiffs, with a view to preserve their lien, retained the mate's receipts, but Coles Brothers, without redeeming the mate's receipts, fraudulently induced the ship-brokers to get bills of lading to their order signed by the master, though the mate's receipts were not produced, and Coles Brothers fraudulently indorsed those bills of lading for value to a *bonâ fide* indorsee. It was held that the plaintiffs could recover damages against the master and owner of the ship for refusing to deliver the goods. In the course of the argument, Lord Campbell expressed his opinion that the property in goods remains in the commission merchant till there is a delivery by him, and that a shipment is not a delivery unless made *animo transferendi;* and in delivering the judgment of the court he was of opinion that "the property in the goods in question had not been divested out of the plaintiffs, the intention being that the goods should remain the property of the plaintiffs till, according to the usual course of dealing, they received the price of them from Coles Brothers by the redemption of the mate's receipt." He says further that "Coles Brothers knew full well that until they redeemed the mate's receipt they had no property in the goods, and no right to obtain a bill of lading for them. They were well aware that in obtaining a bill of lading without the mate's receipt they committed a gross fraud. They thereby acquired the power of giving a right as against the ship-owner or charterer to a *bonâ fide* assignee of the bill of lading for value; but they acquired no right *as against the plaintiffs, in whom the property was still vested.*"

In the present case the defendant Karsandás Mádhavdás has not filed any affidavit, and the only evidence of the relations between him and the plaintiffs is that which has been adduced by the latter. But, on the materials at present before me, I am unable to come to any other conclusion but that the plaintiffs, though they shipped the goods, and took the mate's receipts, some in the name of Karsandás Mádhavdás and some in the name of Hirjibhái Sorábji (who is said to have been a servant of Karsandás), others being in their own name,

did so not intending thereby to transfer the property in the goods to Karsandás, except on payment by him of the money due in respect of such goods; and that, to preserve their hold on the goods, they retained possession of the mate's receipts, trusting to the general mercantile usage that bills of lading are not signed for goods unless on production of such receipts. I consider that Karsandás, in breach of the agreement between him and the plaintiffs, and in fraud of their rights, induced the master to sign bills of lading without the mate's receipts being produced, and, in fact, before the greater part of the goods were shipped at all, and, having obtained such bill of lading, indorsed it for value to the defendants Messrs. Jefferson, Campbell, and Co. But if I am correct in the view which I take, that the property never passed, or was intended to pass, out of the plaintiffs, the act of Karsandás in indorsing the bill of lading to Messrs. Jefferson, Campbell, and Co. was the act of a man who had no title so to indorse the bill, or to the goods to which it related, and his indorsement, as against the plaintiffs' right of property, cannot be allowed to have any legal operation. Had there been any evidence of collusion between the plaintiffs and the defendant Karsandás, that they had by their conduct in any way authorised or enabled the defendant Karsandás so to obtain and deal with the bill of lading, this would, I think, have been sufficient ground for holding them to be precluded from insisting on their legal right to the goods; but I am unable to see any evidence of such collusion or conduct. With regard, then, to 299 of the 609 bales in question, I do not consider that the defendants Messrs. Jefferson, Campbell, and Co. have shown any cause at all against the order for an injunction being made absolute; and with regard to the residue, namely, 310 bales, I consider, for the reasons above stated, that the cause they have shown ought not to prevail; and I, therefore, consider that the order of the 6th of July must be made absolute. Costs will, of course, be reserved.

NOTE.—In the above case service of the summons of the rule to show cause on the defendant M. Donald, who was described in the heading of the plaint as "of Liverpool, residing in England, and carrying on business

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in Bombay by means of his agents Messrs. Rennie, Scovell, and Co., of Bombay, merchants," was effected by serving it upon Thomas Wilson, manager of the firm of Rennie, Scovell, and Co.

On the 9th of July *the Honorable A. R. Scoble* (Acting Advocate General) (with him *Starling*) appeared before GREEN, J., to protest against the service of the summons, and of the rule to show cause against the injunction being held to be good service on the owner of the "Teresa," upon the grounds stated in an affidavit of Thomas Wilson. Therein it was stated that the "Teresa" arrived in Bombay from Liverpool consigned to Rennie, Scovell, and Co., as freighters' agents, under a charterparty sent to Mr. Wilson by the freighters, Rennie, Antrobus, & Co., which firm was composed of the same members as Rennie, Scovell, & Co.; that in the charterparty the owners of the ship were described as Messrs. Callart & Co., but that, from the Register, M. Donald, of New Brunswick, appeared to be the owner, and that he, Mr. Wilson, did not know who was really the owner. That Rennie, Scovell, & Co., had no communication with M. Donald (nor had Rennie, Antrobus, & Co., as it was believed), but only with Callart & Co. and that the relation of Rennie, Scovell, & Co. towards the ship and the said Callart & Co. was simply that which was defined by the charterparty, wherein the ship was addressed to Rennie, Scovell, & Co. for outward business; and that although, by virtue of that consignment, Rennie, Scovell, & Co., in accordance with the usual practice, styled themselves, in all matters relating to the said outward freight of the ship, "Agents for the Captain and Owners," yet the duties of Rennie, Scovell, & Co. were simply to procure freight for the ship outwards, to prepare the outward manifest, to check and pass bills of lading for the captain's signature, to exercise a general superintendence over the ship's disbursements, and advise the captain in all matters relating to the loading and despatch of the ship from this port; but not, without the special instructions of the owner (which in this case had not been received), in any way to interfere with, or exercise any sort of control over, the cargo when on board; that M. Donald did not carry on business in Bombay by means of Rennie, Scovell, and Co., and that neither they nor Mr. Wilson had authority to appear for him in the above suit. Mr. Wilson also, amongst other things, stated that the bill of lading alluded to in the plaint was signed without his knowledge, and without the knowledge of Rennie, Scovell, & Co.

McCulloch argued in support of the sufficiency of the service.

GREEN, J., held that the service was good service upon the owner, but offered to allow time to Rennie, Scovell, & Co. to communicate with the owner before the argument of the rule.

Suit No. 612 *of* 1868.

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VINA'YAK RAGHUNA'TH.....*Plaintiff.*

THE GREAT INDIAN PENINSULA RAILWAY COMPANY .....*Defendants.*

Adoption—Son adopted after Death by Widow of Deceased—Legal Representative—Child—Damages—Measure of Damages—Act XIII. of 1855.

A son adopted by the widow of a deceased Hindú (in respect of whose estate no probate, letters of administration, or certificate of heirship has been granted) is the legal representative of the deceased, and, as such, is entitled to maintain a suit under Act XIII. of 1855 for the benefit of the persons, if any, entitled to compensation for the injury occasioned to them by the death of the deceased against those whose negligence caused that death.

Such an adopted son is not, however, entitled to have any portion of the damages awarded in the suit allotted to him as a child of the deceased.

Quære—Whether a son, if adopted by the deceased in his lifetime, would be entitled to damages under that Act?

Measure of damages in actions brought under Act XIII. of 1855.

THE facts of this case appear from the judgment of the court.

The suit was tried in a Division Court by WESTROPP, J.

The Honorable A. R. Scoble (Acting Advocate General) and *McCulloch* for the plaintiff.

Marriott and *Ferguson* for the defendants.

Cur. adv. vult.

29th August 1870. WESTROPP, C. J.:—Raghunáth Náráyaṇ, chief Diváṇ or minister of His Highness the Rájá of Dhár, was travelling in a second-class carriage, part of a train, upon the defendants' railway, early on the morning of the 26th of June 1867. The train then met with an accident at that part of the line where there is a bridge over the Suki *nallá*, between Bhosáwal and Nimbora. The Diváṇ was, by that accident, so much injured, that he died upon the 28th of the same month. The evidence contained in the reports of the accident, made by the defendants' own officers, was so strong, that the learned counsel for the defendants, at an early stage of the trial, admitted that they could not deny negligence on the part of their clients. They also admitted

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that the Diván was a passenger in the train, and that his death was occasioned by the accident. These admissions confined the case to the fourth and fifth issues. The fourth issue is whether the plaintiff is entitled to recover any damages for his own benefit in respect of the grievances alleged in the plaint, and, if so, how much. The fifth issue is whether the plaintiff is entitled to recover any damages on behalf of the widow and daughter of Raghunáth Náráyan in respect of the grievances in the plaint mentioned, and, if so, how much?

The deceased Diván, Raghunáth Náráyan, had a son who predeceased him by only eight days. The deceased left surviving him a widow, named Jánkibái, aged about thirty-six years at the time of her husband's death, and four daughters, three of whom were married before his death; the fourth, named Mathrá or Mathurá, is about five or six years of age, and still unmarried. Jánkibái has, since her husband's death, adopted the plaintiff as son of the deceased. There is not any evidence of express authority having been given to her by her husband to adopt a son, but, on the other hand, there is not any evidence of his having refused to adopt, or of his having enjoined her not to adopt; and, accordingly, under the Hindú law prevailing in the Dakhan, to which he belonged, his sanction of the adoption will be implied: *Rakhmábhái* v. *Rádhábhái* (*a*). The adoption being valid, and no probate, or letters of administration, or certificate of heirship having been granted in respect of the estate of the deceased, the plaintiff, as his adopted son, is his legal representative, and as such is, under Sec. 1 of Act XIII. of 1855, entitled to maintain this action on behalf of the parties upon whom that Act confers the right to damages from the defendants, as having, by their neglect and default, in not having properly constructed their bridge, caused the death of the Diván. His widow and unmarried daughter are clearly within the Act as persons entitled to damages proportioned to the loss resulting from his death to them respectively.

It is unnecessary for me to decide, and I, therefore, wholly abstain from giving any opinion, whether a son, adopted in

(*a*) 5 Bom. H. C. Rep., A. C. J. 181.

the lifetime of the deceased person in respect of whose death the action is brought under the Act, would be entitled to damages; but I think that the word "child" (which under the glossarial clause [Sec. 4], is defined as including the "son and daughter, and grandson and granddaughter, and stepson and stepdaughter," of the deceased) must be limited to mean one who is the child of the deceased at the time of his death; and herein might perhaps be included a child of which the widow was then *enceinte*, but not a son adopted, after the death of the deceased, by her. The word "child" is, in the English Stat. 9 & 10 Vict., c. 93, defined in the same way as in Act XIII. of 1855, and has been held to mean a legitimate child. Accordingly, where the mother of a woman who was killed brought, as administratrix, an action on behalf of herself and her deceased daughter's illegitimate child, damages were given to the plaintiff on her own account only, and none for the illegitimate child: *Dickinson* v. *The North-Eastern Railway Company* (*b*). As the plaintiff in this suit has been lawfully adopted by the widow, and, therefore, cannot be regarded by Hindú law as illegitimate, that case applies to the present one no further than as showing that the Court of Exchequer, in construing the word "child," was not disposed to give any further extension to the legal meaning of that word than the statute itself, in its glossarial clause, had already given to it beyond its ordinary signification in law. The action had no existence at Common Law—it is the creature of legislation, and the Act ought not to be interpreted so as to impose upon parties who may be sued under it any wider or greater liability than is distinctly within the particular reason for which it was passed. Act XIII. of 1855 is intituled "an Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong." Before the passing of the Act, "actionable wrong" meant any such wrongful act, neglect, or default, as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof.

(*b*) 33 L. J. Ex. 91.

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Actio personalis moritur cum personâ was then the rule. But this Act continued the right of action to his "executor, administrator, or representative, for the benefit of the wife, husband, parent, and child, if any, of the person whose death shall have been so caused," and the damages to be given shall be such as the court "may think proportioned to the loss resulting from such death to the parties respectively for whom and for whose benefits such action shall be brought." The plaintiff was the Diván's first cousin once removed, and lived, it has been said, in his house at Dhár, but at the time of the occurrence of the accident or of the Diván's death had not been adopted, and could not then, either by the law of nature, or the Hindú law, be considered to have been his child. Furthermore, the plaintiff was then seventeen years of age, *i.e.*, one year more than the Hindú law deems full age. Even assuming that the adoption relates back to the death of the deceased, the injury supposed to have been suffered by him, in virtue of the retrospective operation of the adoption, was one to which he was voluntarily subjected by himself and his parents by giving him in adoption. They then knew of the death of the Diván, and, nevertheless, assented to the adoption by the widow, which was to make the plaintiff the son of one whose death had been caused by the negligence of the defendants. In that view the case would seem to be one for the application of the maxim *volenti non fit injuria*. So far, however, from any loss resulting to the plaintiff by the death of the Diván, the plaintiff has been considerably benefited by it, inasmuch as that event was the reason for the plaintiff's adoption, by which he has acquired a right to succeed to the property of the deceased, who, it has been deposed, had an *inám* village in the Dhár territory, and other property. It is vehemently probable that the plaintiff would never have been adopted if the deceased had lived, as he was only forty years of age when he met with the accident, and may fairly have expected to have sons born to him. Under such circumstances, were any damages recoverable by the plaintiff, they could only be nominal damages. But I see no reason for supposing that the Indian Legislature intended to confer upon the widow of

a deceased Hindú the power of imposing upon persons sued under the Act a greater liability than existed at the death of her husband. That Legislature has not shown itself unmindful of the necessity of making in the Act a provision especially suitable to India, not to be found in the English Stat. 9 & 10 Vict., c. 93, by introducing the word "representative" after the words "executor and administrator." So many cases might occur in India in which there would be neither executors nor administrators as to render such an addition indispensable. A later English statute (28 & 29 Vict., c. 95) has made a somewhat similar provision for England. The Indian Legislature being thus alive to the special circumstances of Indian society, and having carefully enumerated, in the glossary to the Act, persons as coming within the scope of the word "child," as used in the Act, who cannot be regarded as within the ordinary legal meaning of that word, I should have expected to find the case of a posthumously adopted son specially mentioned in the Act, if it were intended that he should be included. The fourth issue must, for these reasons, be found in the negative, and in favour of the defendants.

The next question is as to the amount of damages which should be awarded to the plaintiff, not on his own behalf, but on that of the widow and daughter of the Diván. The Diván's father, Náro Jagganáth Gune, stated that the Diván was thirty-eight years of age at the time of his death; but this old man was not a very accurate witness, and it is safer to assume that the Diván was of the age of forty years, which is that named in the plaint. He had formerly been in the British service as a Kárkún at Ratnágirí, in the Collector's department, at Rs. 75 to Rs. 100 per mensem, and had been educated at the High School of Puṇá. Three or four years ago, having left the British service, he became Diván to H. H. the Rájá of Dhár, at Rs. 250 per mensem as salary, with a further allowance of Rs. 6 per month; as a Bráhman writer, Vishvanáth Náráyaṇ, a person attached to his suite, deposed. The Diván's father spoke also of Rs. 131 per month being allowed to the deceased as wages for twenty-six attendants.

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These were not mentioned by the Bráhman, and I understand them to have been persons allotted to him as assistants in his office of Diván, and not as personal attendants. I, therefore, do not reckon their wages as forming any personal allowance to the deceased, or as increasing his dignity. Rs. 256 per mensem equal Rs. 3,072 per annum. Mr. Slater, an insurance company's agent, has been examined to prove that the price of an annuity of Rs. 3,100 on the life of a Hindú aged 38 would be Rs. 40,259-11-10, *i.e.*, allowing him about twenty-two years to live. But that evidence is inapplicable to such a case as the present. The deceased was liable at any moment to dismissal from his office of Diván, which he held neither for life, nor *quamdiu se bene gesserit*, but *quamdiu principi bene placeat*. It is, therefore, impossible to regard his annual income of Rs. 3,072 as Diván in the light of an annuity for life, or for any given number of years. However, looking at his education; his appointment at the time of his death; the probability, if he had lived and lost that appointment, of his getting another; the position in society enjoyed by his widow and daughter while he held his office of Diván, and lost to them by his death; and looking also at his age, which I take to have been forty, and the ages of his wife and unmarried daughter, which were then thirty-six and six years respectively: I think that Rs. 10,000 will be a fair sum at which to assess the damages payable to them—whereof Rs. 7,000 must be allotted to the widow, and Rs. 3,000 to the daughter.

It having appeared, in the course of the above case, that the plaintiff (who was a boy of seventeen years of age) had executed a *mukhtiárnámá* in favour of one Krishṇáji Shideshwar, and that the latter had appointed one Náráyaṇ Bálkrishṇa to bring the suit (who for so doing was to receive one-half of whatever should be received, subject to a private understanding that he was in reality to retain one-third only, and to hand over the difference between one-third and one-half to Krishṇáji Shideshwar), and that such *mukhtiárnámá* had not been signed by the widow or the daughter (who was a minor), the court held that, though the plaintiff

had a right to sue, and to appoint an agent for that purpose, he had no right to make such a bargain as the above on behalf of those interested. The court, therefore, directed the solicitors for the defendants, in conjunction with the solicitors for the plaintiff, to transmit her share of the damages to Jánkibái, the widow of the deceased, at Dhár; and the court further directed that the Rs. 3,000 allotted to Mathurá, the infant daughter of the deceased, should be paid over to the Official Trustee, to be invested in Government paper and held in trust for her: the annual income and dividends to be paid to Jánkibái for the maintenance, education, and clothing of the infant; and Rs. 1,000, part of the principal, to be paid to Jánkibái on the marriage of the infant, for her marriage expenses, and the balance, Rs. 2,000, to be paid to the infant Mathurá on her attaining her full age according to law. Costs of this suit to be paid to the plaintiff by the defendants as between solicitor and client.

Decree accordingly.

Attorneys for the plaintiffs: *Dallas & Lynch.*

Attorneys for the defendants: *Hearn, Cleveland, & Peile.*

NOTE.—Two other cases brought against the same defendants under similar circumstances were decided by the Chief Justice the day before judgment was given in the above suit.

In the first, *Sorábji Ratanji* v. *The G. I. P. Railway Company*, the damages were laid at Rs. 14,400.

The suit was brought by the plaintiff as administrator of his deceased father, on behalf of himself and Ratanbái, the wife, and Chándábái, the mother, of the deceased.

Ratanji Nánábhái, the deceased, was about sixty or sixty-two years of age at the time of his death He was a carpenter, in good health, and an excellent workman. He earned about Rs. 80 *per mensem*, including *dasturi* allowed him by his employer. The plaintiff was in delicate health, unable to earn his livelihood,

WESTROPP, C.J., in giving judgment, said:—Looking at the probable age of the deceased, his state of health, the probable length of time during which he would have sufficient strength to exercise his calling, and the state of dependence of his family upon him, and without pretending to make, or to be able to make, any minute arithmetical calculation of these elements, I think that the sum of Rs. 8,500 will be fair damages; and of this sum I direct that Rs. 4,000 shall be allotted to the plaintiff, Rs. 3,000 to Ratanbái, the widow of the deceased, and Rs. 1,500 to Chándábái, his mother. The defendants must pay the costs of the suit

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as between solicitor and client. [His Lordship added that he made such order as to costs, that the plaintiff and the other persons interested might have the amount allotted to them without deduction, and not as any special mark of disapprobation of the conduct of the defendants.]

In the second case, *Ratanbái* v. *The G. I. P. Railway Co.*, the damages were laid at Rs. 77,500.

The suit was brought by the plaintiff (a woman of forty-nine or fifty years of age), as widow and administratrix of Pálanji Jivanji, on behalf of herself, three sons of the deceased—namely, Dorábji, said to be aged seventeen or eighteen, but who was married and had a son, and was learning the trade of a carpenter; Bezanji, said to be aged sixteen years, but who had been living with his wife for two years, and was learning the trade of a *mistri*; and Ratanji, said to be aged twelve years—and also on behalf of Kharsetji, an infant grandson, aged about three years, a son of a deceased son, Hormasji, of the deceased. "That grandson," his Lordship said, "comes within the meaning given to the word 'child' in the glossary to the Act (XIII. of 1855); but the widow of Hormasji, in whose behalf also the plaintiff sues, does not come within the range of the Act, and is not entitled to any share in the damages."

Pálanji Jivanji, the deceased, was aged fifty-three years at the time of his death (26th January 1869). He was a contractor for building houses and making repairs to ships in the harbour. He had become insolvent, and filed his schedule on the 12th of March 1868. According to the schedule (as finally amended), the total earnings of the deceased for the seven years preceding his insolvency amounted to Rs. 19,000, or Rs. 2,714 per annum = Rs. 226 per mensem, and his losses in contracts during the same period were stated to aggregate Rs. 19,446-14-0. His expenses far exceeded his means, and at the time of filing his schedule he was overwhelmed in debts, his debts amounting to Rs. 1,22,359-11-0. He appeared to have lived very extravagantly. After stating the above facts his Lordship said: What I have already said shows that the amount of damages claimed is quite preposterous. My difficulty is, satisfactorily to myself, to fix any amount. In the case of such a person as the deceased, who, as the evidence shows, even in the last year he was in trade suffered serious loss, and who was habitually a reckless borrower of money, and certain thus to incur a heavy outlay for premium and interest, it is extremely difficult to say what portion of his gross earnings would in his future career have been properly available for his own use and that of his family. His prudence in making, and skill in executing, contracts as a ship and house carpenter, judging from his losses heretofore, would seem to have been but small. Assuming, however, as I think a jury might do, that his past experience and passage through the Insolvent Court would not have been wholly lost upon him, but still not losing sight of his previous career and character, and of the probability that, if he had lived, his subsequent career would have borne, if not a complete, at least a strong, resemblance to it, it is perhaps not unreasonable to suppose that out of his gross earnings, taken at Rs. 226 per mensem, which would appear to have been the average during the last seven years, he might legitimately expend on himself and family Rs. 50 per mensem, *i. e.*, Rs. 600 or £60 per annum, or Rs. 60 per mensem, *i. e.*, Rs. 720 or £72 per annum. That is, I believe, allowing a far more liberal monthly sum than during the seven years

previous to his insolvency he could, having regard to his losses and general position, have legitimately expended. He did, in fact, expend a great deal more, but not legitimately, when his circumstances as respects losses and debts are taken into account.

I am, in such a case as this, necessarily compelled to resort to conjecture, and have to come to the best conclusion that, as jury, I may:—I should have been very glad indeed to have the power of calling in the aid of twelve jurors in such a case.

Mr. Slater has deposed that an annuity of £60 on the life of a Pársi aged fifty-three should be valued at about Rs. 6,185.

Allowing for what the deceased would have expended on himself alone, and for the probability of his power to work or carry on business diminishing as he advanced in age, I think that Rs. 6,500 will be fair damages.

Of that sum Rs. 2,500 should be allotted to the plaintiff (the widow of the deceased); Rs. 700 each to his sons Dorábji and Bezanji, who are, I think, old enough to earn a livelihood for themselves; Rs. 1,100 for Rustamji, the youngest son of the deceased, who is still only a school-boy; and Rs. 1,500 to his grandson, Kharsetji, who, being only three or four years of age, will not for a long time to come be able to gain a living. The shares of Dorábji, Bezanji, Rustamji, and Kharsetji, who are minors, are to be paid to, and invested in Government papers by, the Official Trustee, Mr. Loudon, in trust for them, and to be paid over to them respectively on their attaining their full age of eighteen years. The interest and dividends on their said respective shares are to be paid, during their respective minorities, to the plaintiff for their support and maintenance.

The defendants must pay the plaintiff her costs as between solicitor and client, and simple interest at six per cent. per annum on the amount of this judgment from this 27th day of August until payment, such interest to be divided amongst the plaintiff and her said three sons and grandson in the proportions in which the damages have been allotted to them. Should it be made to appear to the Official Trustee that it is for the benefit of any one or more of the said minors that his said share, or their said shares, respectively, or any part thereof, should be applied in the advancement, or for the benefit, of such minor or minors during his or their minority, the Official Trustee is to be at liberty, personally or by counsel or attorney, to apply to a Judge in chambers for an order or orders to that effect.

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Oct. 8.

Appeal Suit No. 170.

UMED KIKA' .....*Appellant.*
NAGINDA'S NAROTAMDA'S .....*Respondent.*

Hindú Law—Betrothal—Marriage—Specific Performance—Damages for Breach of Contract by Father to marry his Daughter—Decree—Imprisonment for Disobedience of Decree—Civ. Proc. Code, Secs. 78 *and* 200.

The Court will not order the father of a Hindú girl, in a suit to which the girl is not a party, to specifically perform the marriage of his daughter with a person to whom the daughter has been betrothed. It will, however, award damages against the father for breach by him of the contract of betrothal.

Semble that, according to Hindú law, a betrothal is not to be treated as an actual and complete marriage.

No order for enforcing a decree by imprisonment under Sec. 200 of the Code of Civil Procedure should be made until the defendant has had an opportunity of obeying the decree, or has contumaciously refused to obey it.

THE plaint stated that the plaintiff and the defendant were Hindús of the Dízá Zavlá caste, and that on the 23rd of May 1866 the defendant betrothed his daughter Bái Jharmá to the plaintiff, and signed a Gujaráti acknowledgment of such betrothment, purporting to be addressed to Narotamdás Sambhudás, the father of the plaintiff, but in reality intended for the plaintiff, the name of his father, who was then dead, being used as a mark of respect. That from the date of the betrothment down to the month of September 1869 the defendant had always treated the plaintiff as the betrothed husband of the said Bái Jharmá, but on or about that date the defendant refused to send the said Bái Jharmá to visit the plaintiff, as she had been in the habit of visiting him, and, on the plaintiff remonstrating, repudiated the said betrothment. That the plaintiff thereupon caused a meeting of the caste to be summoned, who decided that the betrothment was according to the custom of the caste, and binding on the defendant. That the plaintiff was of the age of twenty-six years, and Bái Jharmá of the age of twelve years. The plaintiff then submitted that the betrothment constituted a

valid and complete marriage according to Hindú law, and that he was the husband of Bái Jharmá, and alleged that all conditions had been fulfilled necessary to entitle him to have Bái Jharmá to cohabit with him, and that there was no good reason why she should not do so; but that the defendant refused to allow her so to cohabit, and, as the plaintiff believed, intended to betroth Bái Jharmá to some other person; and that the plaintiff had suffered much humiliation among the people of his caste by reason of such repudiation by the defendant of the betrothment.

The plaint then prayed (a) that if the court should be of opinion that the betrothment constituted a valid marriage according to Hindú law, the plaintiff should be declared, by virtue of such betrothment, to be the husband of Bái Jharmá, and that the defendant might be restrained from preventing Bái Jharmá from leaving his house and going to the house of the plaintiff; (b) that if the court should be of opinion that the betrothment constituted an agreement to give Bái Jharmá in marriage to the plaintiff, then that the plaintiff might be decreed specifically to perform the agreement, and to do all things necessary towards performance of the same; (c) that the defendant might be restrained from betrothing or giving in marriage, or affecting to betroth or give in marriage, Bái Jharmá to any person other than the plaintiff; (*d*) that if the court should not decree that the marriage of the plaintiff and Bái Jharmá should be carried into effect, the defendant might be decreed to pay to the plaintiff Rs. 10,000 as damages; (e) that the defendant might be decreed to pay the costs of the suit.

The translation of the acknowledgment of betrothment was as follows:—

"Shri 1¼. I bow to Shri Ganesh.—To Shá Narotamdás Sambhudás, by caste Dízá Zavlá Vániá, written by Gándhi Shá Umed Kikábhái, by caste Dízá Zavlá Vániá (to wit). My daughter Bái Jharmá has been betrothed to your son Nágindás. I am duly to receive from you according to the custom of our caste *Palá* (marriage portion) and marriage presents, &c. (Dated) Samvat 1922, Vaisák Vad 4th (3rd May 1866).

(Signed) "UMED KIKA."

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The decision of the caste, referred to in the plaint, was embodied in a document of which the following (bearing date 9th, October 1869) is a translation :—

"On the occasion the whole caste community of Dízá Zavlá assembled at Shri Himjá Mátá's : Shá Narotamdás Sambhudás complained as follows :—On the 4th of Váisák Vad, S. 1922, my son Nágindás was betrothed to Jharmá, the daughter of Gándhi Umed Kiká of Patán, according to the usage of the caste, and writings thereof were made by us mutually, and were signed and delivered by each of us to the other, and attestations were affixed thereto; and subsequently thereto we both parties, of (our own) pleasure, invited (the bride and the bridegroom), and with the assistance of a Zavlá Bráhman performed the *puja patri* (ceremonies) according to the usage of the caste; invited (the bridegroom and the bride) (to the houses of) each other, and several ornaments were put on the daughter-in-law and delivered to Umed Gándhi, and the *Goro* (ceremonies) have been performed, and the Diváli and the Holi (presents) have been made up to this time according to the usage. Now a short time ago words passed between the two *Vevávis* for certain reasons, in consequence whereof Umed Kiká disavows the betrothal. Dayábhái, the son of Shá Narotamdás Sambhudás, made a complaint to the caste respecting the same as follows :—'The caste should settle this matter by examining our writings and papers, and witnesses and evidences; in consequence whereof, the whole community having assembled this day, and having examined the above-mentioned matters and writings, were satisfied that the said betrothal had taken place according to the usage of the caste; and all the members of the caste told Umed Kiká that, as the said betrothal had taken place according to the usage, he should not utter a cross word, and they explained to him in many ways the usages of the caste; but Umed Gándhi refused to abide by the said betrothal. Therefore the whole caste community assembled have resolved as follows :—The marriage ceremony of the said boy and girl shall be performed. Should this girl be betrothed to another (person), no caste intercourse shall take place with Umed Kiká, and whomsoever may accept this girl. The *writi* (official remuneration) of our priest Zavlá Bráhman shall be stopped by (our) caste if he should join in performing the betrothal' (ceremonies) again. Should the same take place in Bombay, or in any other country, intercourse shall be stopped with that (person) also; and caste intercourse shall also duly be stopped with such person as may espouse his part."

This document was signed by thirty-three members of the caste.

After the plaint had been filed, and the summons served in this suit, upon affidavits alleging that the defendant had no immoveable property within the jurisdiction, and that he was about to leave the jurisdiction, with his daughter, with intent to avoid the plaintiff and obstruct the execution of any decree that might be passed, BAYLEY, J., made an order

under Secs. 74, 75, and 78 of the Civil Procedure Code, under which the defendant was committed to custody on the 20th of January 1870 until further order of the Court.

The suit came on for hearing before BAYLEY, J., on the 2nd of April 1870.

The Honorable A. R. Scoble (Acting Advocate General) and *Macpherson* for the plaintiff.

The defendant appeared in person.

The only issue raised was whether the plaintiff was entitled to the relief prayed, or any part thereof.

The plaintiff gave evidence in support of the statements in the plaint, and *inter alia* said that the custom of his caste was for the bridegroom to give Rs. 800 as *palá;* that he was to give Rs. 200 in ornaments, Rs. 200 to the defendant for his expenses, and Rs. 800 were to be deposited by him with Dosábhái Kharsetji in the joint names of himself and Bái Jharmá. He paid in to Dosábhái Kharsetji Rs. 800 on the 1st of May 1866, gave ornaments worth Rs. 374 to Bái Jharmá, and gave the defendant two promissory notes for Rs. 200 each.

The defendant further stated that he had betrothed his daughter to the plaintiff, as all the caste knew, but that the plaintiff had not, according to the custom of the caste, paid him what he had promised.

The issue raised was found in the affirmative, and "the court made a decree in favour of the plaintiff in the terms of the second paragraph of the prayer of the plaint. A perpetual injunction, as prayed for in the third paragraph of the plaint, was granted. The defendant was ordered to pay the costs of the suit, and it was further ordered, under Sec. 78 of the Code of Civil Procedure, that the defendant should be kept in custody until the execution of the decree."

The decree was drawn up accordingly, and the defendant was remitted to custody.

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On the 27th of August 1870, *McCulloch* moved, on behalf of the defendant, for a *rule nisi* for leave to appeal *in formâ pauperis* against the decree of the 2nd of April, excusing the delay on the ground that the defendant was a pauper, that he had had no professional advice, and had been kept in custody under the decree. The appellate court (present WESTROPP, C.J., and GREEN, J.), considering that it had power to relax its own rule as to the time for appealing when good cause was shown, granted the rule. The rule was made absolute on the 1st of September, after an investigation into the pauperism of the defendant, which was, by consent, conducted in chambers.

The appeal came on for argument before WESTROPP, C.J., and GREEN, J., on the 29th of September 1870.

McCulloch and *Latham*, for the appellant:—The betrothal in this case does not constitute a marriage. Both the court below and the caste have treated it as a contract to marry, and it is so treated in the decree. From that decree the plaintiff has not appealed.

Treating it as a contract to marry, it is a contract of such a nature as the court will not decree specific performance of. A decree for specific performance is a remedy peculiar to English law. It was unknown to the Roman lawyers, in the sense at least in which the term is understood in Courts of Equity in England—(namely) an order to do a particular act, followed by imprisonment in case of disobedience until that order is obeyed: Fry on Specific Performance, p. 1. But a decree ordering the performance of an act with an award of damages in case of refusal is common to the Roman law and the Hindú law: Miták., Ch. II., Sec. 11, p. 27; Vyavahár Mayukha, Ch. XI., Sec. 4; and a similar remedy is given by the Civil Procedure Code, Sec. 192. Neither in the Hindú law nor in the Procedure Code is any trace to be found of a remedy similar to that given by Courts of Equity in England. The Courts in India adopting this peculiar remedy from the practice of Courts of Equity in England will adopt it with the modifications and qualifications which prevail there:

Virdachala Nattan v. *Ramasvami Nayakan* (*a*). The present is a contract of which Courts of Equity in England would not decree specific performance: (I.) Because to enable the defendant to obey the decree it would be necessary for him to obtain the consent of a third party: *Howell* v. *George* (*b*); Fry on Specific Performance, paras. 291, 293: (II.) Because this is a contract involving a peculiar personal relation, the enforcement of which might lead to disastrous consequences. [WESTROPP, C. J., referred to *Fitzpatrick* v. *Nolan* (*c*), *Stocker* v. *Brockelbank* (*d*), and *Johnson* v. *The Shrewsbury* and *Birmingham Railway Company* (*e*), in which cases the court refused to decree specific performance of contracts for hiring and service; and in the last of which, Knight Bruce, V. C., said: "We are asked to compel one person to employ, against his will, another as his confidential servant for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still if the two do not agree—and good people do not always agree—enormous mischief may be done. A man may have one of the best domestic servants, he may have a valet whose arrangement of clothes is faultless, a coachman whose driving is excellent, a cook whose performances are perfect, and yet he may not have confidence in him; and while on the one hand, all that the servant requires or wishes (and that reasonably enough) is money, you are, on the other hand, to destroy the comfort of a man's existence for a period of years by compelling him to have constantly about him in a confidential situation one to whom he objects." It may have been somewhat similar considerations to these which render our English Equity Reports completely devoid of precedents of decrees for the specific performance of a promise to marry, and induced our Courts of Equity to refrain from causing what might be irreparable injuries by compelling the union of two persons who might never agree, and to leave the complaining party to seek redress by damages at law.] There never, it is believed, has been an instance in which a contract to marry has been specifically

(*a*) I. Mad. H. C. Rep. 341. (*b*) I. Maddock 1. (*c*) I. Ir. Ch. 671.
(*d*) 3 Mac. & Gor. 250. (*e*) 3 De G. Mac. & Gor. 914, 926.

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enforced in Courts of Equity in England. The proper course for the court to have taken is pointed out in the passage already cited from the Mitákshará—(namely) a direction to the defendant to marry his daughter to the plaintiff, with an award of damages, there called a fine, in case of refusal; and see Steel's Hindú Castes, pp. 31, 32, ed. of 1827. This has been the course pursued in the only reported cases upon this subject. They are all to be found in Borradaile: see *Khooshal* v. *Bhugwan Motee* (*f*); *Atmaram Kesoor* v. *Sheolal Muloockhund* (*g*); *Kaseeram Jeetram* v. *Bhugwan Poorshotum* (*h*); *Deochund Nath* v. *Juvehur Bechur* (*i*); *Mt. Ruliyat* v. *Madhowjee* (*j*); and this would have been the correct form of decree if it had been made under Sec. 191 or 192 of the Code of Civil Procedure.

If it were possible to treat the betrothment in this case as a marriage, the suit is defective, as it would establish the *factum* of a marriage between the plaintiff and Bái Jharmá, the person principally interested, in the absence of Bái Jharmá.

[GREEN, J., referred to *Ramsurn* v. *Rakhal Doss* (*k*).] Bái Jharmá cannot be treated as a mere chattel.

Then as to damages, we say that this agreement is a social pact, an imperfect obligation, the only remedy for breach of which is that to which the plaintiff has in the first instance resorted—excommunication from caste intercourse; but if that is not so, then we say that the plaintiff has not proved that he has sustained any damages, and this court will not now allow him to rectify that omission, especially as the defendant has already been in custody for more than eight months.

The clause in the decree which directs the defendant to be kept in custody until execution of the decree is improper. That should have formed the subject of a separate order when the defendant had had an opportunity of obeying the decree and had disobeyed it (*l*).

(*f*) I. Borr. 155., ed of 1862. (*g*) Ibid. 397. (*h*) 2 Ibid. 528.
(*i*) Ibid. 576. (*j*) Ibid. 739. (*k*) 11 Calc. W. Rep., Civ. R., 412.
(*l*) 1 Ind. Jur. N. S. 327, *in re* Kallachand Dass.

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The Honorable A. R. Scoble (Acting Advocate General) and *Macphérson*, for the respondent: There is nothing in the nature of this contract to prevent the court from specifically carrying it into effect. A similar obligation was declared enforceable by the Privy Council in *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum* (*m*). [WESTROPP, C.J.:—The marriage in that case was complete, and was, moreover, followed by cohabitation. Is there any case in which specific performance of a betrothal was decreed in the late Supreme Court?] No. But the absence of such cases is accounted for by the gradually lessening influence of caste. Formerly the remedy afforded by the caste was adequate to compel the performance of such an agreement as the present one. In this case it has proved futile. The betrothment is really a marriage; nothing more is needed to complete that marriage but consummation: Strange, vol. I., pp. 35—37; Macnaghten, H. L., pp. 57, 58 (ed. of 1829); Manu, ch. 9; Grady, H. L. pp. 7—9; Digest, vol. II., p. 173, para. 169, (Mad. ed.); Norton, H. L., p. 4. The remedy pursued in this case is pointed out as the proper remedy in Strange, vol. II., pp. 34—38. The absence of Bái Jharmá is immaterial. The policy of the Hindú law vests the girl absolutely in her parents and guardians, and her consent or non-consent the court would not consider: Grady, H. L., p. 7. This is in fact a suit to compel the father to allow restitution, or, more properly speaking, institution, of conjugal rights, and as such is enforceable in the Civil Courts, the parties being Hindús. The English law has no application to this case, as the Charter expressly reserves their own law of contract, marriage, and succession to the Gentoos. They also cited *Ardaseer Cursetjee* v. *Perozeboye* (*n*); *Chotun Beebee* v. *Ameer Chund* (*o*); *Melaram Nudial* v. *Thanooram Bamun* (*p*); *Ramsurn Mitter* v. *Rakhal Doss and others* (*q*).

The form of the decree is correct. The Court at the hearing is entitled to continue the imprisonment until execution:

(*m*) 11 Moo. Ind. App. 551. (*n*) 6 Moo. Ind. App. 348, 390.
(*o*) 6 Calc. W. Rep, Civ. R. 105. (*p*) 9 Ibid. 552.
(*q*) 11 Ibid. 412.

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Sec. 78 and 200 Civ. Proc. Code: *Dwarkanath Doss v. Unnoda Churn Doss* (*r*); I. Ind. Jur. 327.

The defendant in this will be assumed to have disobeyed the order of the Court: "*omnia præsumuntur recte esse acta.*" It is for the defendant to rebut that presumption.

If the court will not decree specific performance, the plaintiff must be entitled to substantial damages. We ask the court either itself to assess those damages, or to remand the case to the lower court for the purpose of having them assessed there.

Latham was heard in reply.

Cur. adv. vult.

On the 8th of October the judgment of the Court was delivered by

GREEN, J. (who, after stating the pleadings and the two writings above set out, proceeded):—On the 17th day of January (on which day the plaint was accepted) the plaintiff, made an application to the court, supported by affidavits stating (amongst other things) that the defendant was about to leave the jurisdiction of the court with his daughter, with intent to avoid the plaintiff in this suit, and to obstruct the execution of any decree that might be passed against him. An order was made to bring up the defendant to show cause why he should not give good and sufficient bail for his appearance to answer any judgment that might be passed against him in the suit. On the 20th of January 1870 the defendant was brought up before the Judge in chambers, on a warrant of arrest issued in pursuance of the said order; and it was then ordered, the defendant not showing any good and sufficient cause against imprisonment, that the Sheriff should detain the defendant in custody until further order, unless the defendant should furnish, to the satisfaction of the Prothonotary, security to the amount of Rs. 3,000, and that the plaintiff should pay to the Sheriff, by monthly instalments in advance, diet-money at the rate of four annas per diem. The defendant, not having furnished security,

(*r*) 8 Calc. W. Rep., Civ. R., p. 318.

remained in custody, under the order of the 20th of January, till the suit came on for hearing, on the 2nd day of April last. On this occasion the defendant was not represented by counsel, and the learned Judge who tried the case had not the advantage of the full discussion which it has received before this court. The only issue raised by the court at the hearing was whether the plaintiff is entitled to the relief prayed or any part thereof. The acknowledgment of betrothal of the 3rd of May 1866 was admitted by the defendant, and indeed the fact of the betrothal having taken place is not disputed by him. In his examination as a witness the plaintiff deposes that Rs. 800 is the customary *palá* or marriage portion in his caste, and that he was to give Rs. 200 worth of ornaments, and Rs. 200 to the defendant for his expenses; that Rs. 800 were deposited by him (the plaintiff) with one Dosábhái Kharsetji, on the 1st of May 1866, in the joint names of himself and Bái Jharmá; that on the 2nd of May 1866 he gave to the defendant two promissory notes for Rs. 200 each, one payable after one month, the other on demand; and that he had presented ornaments worth Rs. 374 to Bái Jharmá, which, according to custom, would be in the defendant's custody. He further deposes that, according to the usages of the caste, Bái Jharmá was old enough to come and live with him, being nearly twelve. The rest of the evidence given was principally with regard to the caste meeting of the 9th of October 1869, and the substance of what passed at that meeting is embodied in the paper already mentioned. At the hearing the learned Judge made the decree now under appeal, and which is as follows :—

"That the defendant do specifically perform the agreement, contained in the said betrothment of the defendant's daughter, Bái Jharmá, to the plaintiff, and do all things on his part towards the performance of the same; that the defendant be restrained from betrothing or giving in marriage, or affecting to betroth or give in marriage, the said Bái Jharmá to any person other than the plaintiff; that the defendant do pay to the plaintiff the sum of Rupees 819-12-0 for his costs of suit; and, lastly, that the defendant be retained in custody until the execution of this decree."

Under this decree the defendant has since remained in custody, no process in execution other than as aforesaid

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having been issued from the court. Against this decree the defendant, Umed Kíká, has appealed, and in support of his appeal his counsel has urged several objections, which may be stated as follows:—(1) That to a suit in which such a decree as the one in question is pronounced, the person alleged to have been betrothed, namely, Baí Jharmá, is a necessary party; (2) that treating the betrothment in question (as the decree does) as a contract for a marriage to be performed at a future time, it is a contract of such a nature as cannot be decreed by the court to be specifically performed; and (3) that the part of the decree ordering the retention of the defendant in custody until execution of the decree, is irregular, and not in accordance with the provisions of the Code of Civil Procedure.

Taking the decree in connection with the prayer of the plaint, it must, we consider, be regarded as a decree for specific performance of a betrothal which in itself did not constitute a marriage. The decree, in our opinion, treats the betrothal as not in itself constituting a marriage, and contemplates some further acts, either ceremonial or otherwise, as being necessary to give a matrimonial character to the relation between the plaintiff and Bái Jharmá, and it is the specific performance of these acts (which, however, neither the plaint nor the decree precisely determines) which the decree is directed to enforce.

The remedy by a decree for specific performance given by the law of this court is, as is well established, not by any means a remedy necessarily incident to all contracts, and the ground of its exercise is generally referred to the incompleteness as relief of a mere award of damages. Further, it is a remedy granted only in certain classes of contracts, and to a considerable extent is a matter of discretion with the court in each particular case. It is a remedy certainly not granted in Courts of Equity in England in cases of breaches of promise to marry—the remedy in damages being considered an adequate remedy, or at all events, if not an adequate, still the only, remedy which the law of that country affords for

breaches of that contract, and nothing that can be considered as an authority of any weight has been cited in the present argument to show that a promise to marry has ever been enforced specifically by a decree of any Anglo-Indian court in the sense in which specific performance is known to the English law—that is, that in the event of disobedience of the decree of the court specifically to perform such promise, the party disobeying such decree is subjected to imprisonment. Five cases from Borradaile's Reports, viz., *Khooshal and others* v. *Bhugwan Motee Barr*, *Atmaram Kesoor* v. *Sheolal Mulookchund and another*, *Kaseeram Joeetram* v. *Bhugwan Purshotum*, *Deochund Natha* v. *Juvehur Bechur*, *Mt. Ruliyat and another* v. *Madhowjee Panachund*, have been cited in the course of the argument, in which the court whose decisions are there reported has administered, or attempted to administer, relief in the case of a repudiated betrothal. These cases, however, when examined, do not amount to more than this—that the court directed the betrothal or promise of marriage to be carried into effect, and decreed that if it was not carried into effect within a certain limited period, the defendant should pay a certain sum by way of damages. In substance there is little distinction between a decree of this nature and the judgment for the plaintiff in an action of detinue before the Common Law Procedure Act of 1854, when the defendant had the option to deliver the goods, or to retain them and pay the value assessed by the jury; but such a decree is a very different thing from a decree for specific performance, by virtue of which the defendant must do the very thing ordered by the decree, or submit to imprisonment till he obeys: and a decree of this nature (and which the decree under appeal is) has, so far as the authorities cited in the argument go, and, so far as we are aware, never been pronounced by any Anglo-Indian court in the case of a breach of a contract to marry or give in marriage. The absence of such authority seems, in our opinion, to show that in those courts the case of the breach of such a contract has been always considered to be not a proper case for the exercise of the court's jurisdiction in decreeing specific performance.

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The learned counsel for the respondents have, however, contended that the court ought to regard the betrothal in this case as an actual marriage, and to enforce the relation so constituted, by ordering the defendant to deliver his daughter to her husband, the plaintiff; and in support of this contention they have cited certain dicta from Macnaghten's Principles and Precedents of Hindú Law and other text-books.

In the present case, however, we consider that the decree of the court below, as well as the evidence, precludes this view from being adopted. The decree has dealt with the betrothal as an executory contract, as something to be performed, not as an actual marriage. There is no evidence in the present case that the betrothal was of such a character as to make applicable to it the authorities or dicta above referred to. The evidence indeed is rather the other way; the caste meeting above referred to do not so treat it in their resolution; they say, "The marriage (ceremonies) of the boy and girl shall be performed," thus indicating that, in their opinion at least, the betrothal did not, without more, constitute the plaintiff and Bái Jharmá husband and wife. We think, further, notwithstanding the dicta last referred to, that Hindú law-books of authority recognise the principle that a betrothal is not to be treated as an actual and complete marriage: see the Mitákshará, Ch. II., sec. XI., pp. 26, 27, and 28; and Steele's Summary, 1st ed., pp. 31, 32, and 162-163. According to the former book, the repudiation or a retractation of a betrothal is to be punished by a fine to the King, and the affiancer has to repay to the bridegroom anything expended on account of the espousals; but there is no hint of any remedy like specific performance being applied to such a case. It is also to be observed that, according to the same authority, a retractation is authorised if there be good cause for it, and the only good cause there specifically mentioned is "if a preferable suitor present himself."

The respondent's counsel have pressed upon our consideration certain propositions laid down in the judgment of the Privy Council in the case of *Moonshee Buzloor Ruheem* v.

Shumsoonissa Begum (*ubi suprà*). The facts of that case, it must be observed, are materially different from those of the present one. There the parties were actually husband and wife, had cohabited together, and had had issue of their marriage; and the Privy Council lay down the propositions that in these circumstances a Mussalmán husband may institute a suit in the Civil Courts of India for a declaration of his right to the possession of his wife, and for a sentence that she return to cohabitation, and that such a suit must be determined according to the principles of the Muhammadan law. That case, we think, would have been a pertinent authority had this suit been one in which an actual marriage was alleged, and proved to exist, between the plaintiff and Bái Jharmá, and which asked for a decree that she return to, or, perhaps, commence cohabitation with, him. But the decree under appeal here is based, in our opinion, on the supposition that an actual marriage has not taken place; and even had the decree been according to the 1st paragraph of the prayer of the plaint, and declared the plaintiff to be, by virtue of the said betrothment, the husband of the said Bái Jharmá, such a decree would, in our opinion, have been irregular and erroneous, owing to the absence, as a party to the suit, of Bái Jharmá, the person most interested in contesting the making of such a declaration, and most immediately affected by it, and would have been unsupported by evidence, there being, as we consider, no proof that the ceremony or ceremonies which were performed on the occasion of the alleged betrothal amount to a marriage as between Hindús of the caste to which the plaintiff and Bái Jharmá belong. We are, therefore, of opinion that the decree in its present form cannot be sustained, and we cannot accede to the contention of the respondent's counsel that the circumstances of the case, or the frame of the suit, admit of any decree being made declaring the betrothal to constitute a valid marriage, and giving consequential relief in the nature of a decree enforcing cohabitation.

As, with the principal part of the decree ordering specific performance, the accessory parts which order an injunction

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and the imprisonment of the defendant until execution of the decree must fall, it is not perhaps necessary to express any opinion as to that part of the decree which orders the retention of the defendant in custody until execution of the decree. We think, however, that any order for the imprisonment of a defendant until execution of the decree made under Sec. 78 of the Civil Procedure Code should be made before the hearing, or at any rate upon application in the manner pointed out in Secs. 74—77, and that an order under Sec. 78 should not form any portion of the decree itself, and that any order for enforcing a decree by imprisonment under Sec. 200 should not be made till after the defendant has at least had opportunity of obeying the decree, or has contumaciously refused to obey it.

Though we are of opinion that the decree, as it stands, cannot be sustained, we consider that some relief can be given to the plaintiff in the present suit in the way of damages. We consider that the plaintiff has sustained damages by the refusal of the defendant to give effect to the admitted betrothal of his daughter, and the cases cited from Borradaile's Reports, and the passages of the Mitákshará referred to, furnish authority for granting the plaintiff relief pecuniarily in respect of such damages. The plaintiff has, in the expectation of that betrothal being carried into effect, presented ornaments and clothes to the girl, of the value of Rs. 374; he has delivered two promissory notes for Rs. 200 each to the defendant, and has deposited Rs. 800 with Dosábhái Kharsetji Wádiá, in the joint names of himself and his expected wife. He has also, we think, necessarily sustained some damage to his credit and reputation by reason of the refusal of the defendant to give his daughter according to his promise; but in estimating the amount of damages to be awarded, we have considered it proper to have regard to the fact that the defendant has already suffered imprisonment for nearly nine months.

The decree of this court is that the decree of the 2nd of April 1870 be reversed, and in lieu thereof the following

decree be substituted:—That the defendant do return to the plaintiff the two promissory notes for Rs. 200 each, delivered to him by the plaintiff on or about the 2nd of May 1866; declare that the amount now due in respect of the deposit made with Dosábhái Kharsetji Wádiá, in the joint names of the plaintiff and Bái Jharmá, on the 1st of May 1866, is discharged from any claim in respect of the betrothal or the contract to marry in the plaint mentioned; and that the plaintiff is also entitled to receive from the Prothonotary the ornaments and clothes delivered to him by the defendant (as a condition of being allowed to appeal *in formâ pauperis*); and decree that the plaintiff do recover from the defendant, as damages in respect of the breach of the contract of betrothal in the plaint mentioned, the sum of Rs. 301, and the sum of Rs. 819-12-0, his costs of the suit in the court below, the Court being of opinion, and certifying, that by reason of the general importance of the case it was fit to be brought in the High Court. With regard to the costs of the appeal, we order that the same be paid by the respondent. The Court also orders the immediate discharge of the defendant from custody.

Decree accordingly.

Attorney for the appellant: *R. A. Dallas,* Attorney for Paupers.

Attorneys for the respondent: *Acland, Prentis, and Bishop.*

Suit No. 814 *of* 1868.

Nov. 17.

MEGRA'J JAGANNA'TH..... *(Defendant) Appellant.*
GOKALDA'S MATHURA'DA'S..... *(Plaintiff) Respondent.*

Hindú-Law Merchant—Hundi—*Notice of Dishonour*—*Fraudulent Detention of* Hundi—Peth—*Notice of Loss.*

In order to charge the indorser of a dishonoured *hundi*, the holder must give reasonable notice of such dishonour to the indorsor he seeks to charge. The demand of a *peth* cannot be deemed to be equivalent to a notice of dishonour.

THE plaint in this case stated (1) that on the 8th of March 1868 one Shivnáráyaṇ Javerimal by his *hunḍi* directed to Lachhmandás Choṭurám at Haidarábád in the Dakhaṇ,

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directed the said Lachhmandás Choṭurám to pay to Khánṣurám Sháligrám or *order* Rs. 2,500 (Haidarábád currency) fifteen days after date; that Khánsurám Sháligrám indorsed the said *hunḍi* to one Motichand, who indorsed it to one Harrakchand, and that Harrakchand indorsed the said *hunḍi* to the defendant, who indorsed the same to the plaintiff. That the said *hunḍi* was duly presented for payment and was dishonoured, *whereof the defendant had due notice*, but did not pay the same. (2) On the 23rd of March 1868 the plaintiff, at the request of the drawee, delivered the said *hunḍi* to the drawee at Haidarábád, that he might make a copy of it, and on the plaintiff demanding the *hunḍi* the drawee refused to redeliver it, and alleged that it had been lost.

The third paragraph of the plaint then stated that, according to the usage and customs of Márvádi and Gujaráti shroffs and bankers, in the event of a *hunḍi* being lost, *or being fraudulently detained from the rightful holder thereof*, by any of the parties thereto, every indorsor is bound to deliver to his immediate indorsee a *peṭh* or duplicate of the *hunḍi* so lost or detained. It was then stated that the plaintiff had demanded a *peṭh* from the defendant, which the defendant had refused to give.

The plaintiff prayed that the defendant might be decreed to pay to the plaintiff the sum of Rs. 2,000 (being the equivalent of Rs. 2,500 Haidarábád currency), the amount of the said *hunḍi* with interest at nine per cent. per annum from the 23rd of March 1868. The plaintiff in the alternative sought to recover the same sum as damages for the wrongful refusal by the defendant to deliver the *peṭh*.

The defendant, by his written statement (*inter alia*), denied the notice of dishonour, and the existence of the usage or custom set up by the plaintiff.

The case came on for hearing before ARNOULD, J., on the 6th of April 1869, when, the *hunḍi* not being produced, and its loss not having been satisfactorily proved, a commission was directed to issue to Haidarábâd that witnesses might be examined as to the alleged loss of the *hunḍi*.

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On the return of the commission the case came on for hearing before SARGENT, J., on the 24th of March 1870.

From the evidence given under the commission, it appeared that the messenger of the Haidarábád firm of the plaintiff, one Bandá Allí, presented the *hunḍi* about ten days after its date at the drawee's firm, and that the drawee received the *hunḍi* for the purpose (as he alleged) of carrying its amount to the credit of the plaintiff, who was indebted to him. The drawee, after making an entry in his *nakal*, sent the *hunḍi*, but not as a paid-off *hunḍi*, to Shivnáráyaṇ Javerimal, the drawer at Bombay, about seven days after its presentation, as he had written to ask for it. This was the usual custom. The *hunḍi* was produced by the drawer at the hearing before Sargent, J.

The plaintiff's Haidarábád *munim* alleged that the drawee had retained the *hunḍi* by force (*zabardasti*); that he had no business to keep it, and that his so doing was opposed to *sávkári* custom; that his master's firm did not owe any money to the drawee, Lachhmandás Choṭurám, at that time, and had not, then or since, had any transactions with Lachhmandás Choṭurám.

On the 22nd of April 1868, the plaintiff, through his attorney, sent the following letter to the defendant:—

"To MEGRA'J JAGANNA'TH.

I am instructed by my client Govindás Mathurádás* to give you notice that the *hundi* for Rs. 2,500 drawn by Shivnáráyan Javerimal upon Lachhmandás Choturám of Haidarábád, dated Phálgun Shud 15th, and sold and indorsed over by you to my client, has been lost. You are, therefore, hereby required to give him the second of exchange, or *peth*, of the *hundi* within two days from the service hereof, otherwise my client will hold you responsible for the said sum of Rs. 2,500 and interest thereon, and all costs and charges which my client may incur thereby.

Dated this 22nd of April 1868.

Yours truly,
C. TYABJI,
Attorney at Law."

There was some evidence of an unsatisfactory character given of a verbal communication by the plaintiff to the defendant, regarding the nonpayment of the *hunḍi*, prior to the

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letter of the 22nd of April. The plaintiff's Haidarábád firm a few days after the presentment of the *hundi*, wrote a letter to the plaintiff's Bombay firm asking for a *peth* of the *hundi*, but giving no reasons why it was required. A decree was given in favour of the plaintiff by SARGENT, J., on the 30th of April 1870.

From this decree the defendant appealed, and the appeal came on for hearing before WESTROPP, C. J., and GREEN, J., on the 17th of November 1870.

The Honorable A. R. Scoble (Acting Advocate General) and *Starling*, for the appellant:—The evidence shows clearly that notice of dishonour was not given to the defendant in this case prior to the letter of the 22nd of April 1868, and that letter is not a notice of dishonour; it is a demand for a *peth*, which would lead the defendant to believe that the *hundi* had never been in fact presented. Notice of dishonour is necessary, according to Hindú usage (which in this respect coincides with English law) before the holder of a *hundi* can recover from his indorsor: *Sumboonath Ghose* v. *Juddoonath Chatterjee* (*a*); *Deobo Moyee Dossee* v. *Juggessur Hati* (*b*); *Jeetun Loll* v. *Sheo Churn* (*c*); *Radha Gobind* v. *Chundernath Dass* (*d*); *Gopal Dass* v. *Sheikh Syad Ali* (*e*); *Gopal Doss* v. *Seeta Ram* (*f*). These cases show that though the English law of bills of exchange, in all its strictness as to immediate notice of dishonour, may not be applicable to *hundis*, yet that a *reasonable* notice of dishonour must be given in order to charge the indorsor of a *hundi*. As to the English law, and the reasons upon which the rule was founded, they cited *Gillard* v. *Wise* (*g*), and on the wording of the notice of dishonour *Solarte* v. *Palmer* (*h*). They also contended upon the evidence that the *hundi* had in fact been paid, the drawee having given credit to the plaintiff for its amount, and that it was only the mode of payment that the plaintiff objected to.

(*a*) 2 Hyde's Rep. 259. (*b*) 1 Calc. W. Rep., Civ. R. 75.
(*c*) 2 *Ibid.* 214. (*d*) 6 *Ibid.* 301.
(*e*) 3 Ben. L. Rep., A. J. Civ. 198. (*f*) 3 Agra Rep. 268.
(*g*) 5 B. & C. 134. (*h*) 7 Bing. 530.

Mayhew and *Tyabji* for the respondent. The defendant, if not liable on the *hundi*, is liable for its amount as money had and received to the use of the plaintiff, as the drawee did not pay. The application of English law to *hundis* is disclaimed in all the cases relied on for the appellant, and these cases show that reasonable notice only need be given, without determining what is reasonable notice. Discarding the ideas insensibly imbibed from English law, it must be held that the notice given on the 22nd of April 1868 was given within a reasonable time; and what was stated in that notice was sufficient to put the defendant upon his guard, and throw upon him the *onus* of making further inquiry, and so ascertaining the true facts of the case. [WESTROPP, C.J.:—That is not enough; unless direct information, or such as would raise a clear implication, that the *hundi* had been seen by the drawee and dishonoured, is afforded, the notice is insufficient.] The defendant promised to give a *peth*, as he was bound to do on a fraudulent detention of the *hundi*, and as he has not done so, the plaintiff is entitled to recover: Steel on Caste, pp. 318, 325: *Dávlatrám Shrirám* v. *Bulákidás Khemchand* (*i*).

The Advocate General was not called upon to reply.

WESTROPP, C.J. (after reading the plaint, continued):—In the first paragraph of his plaint the plaintiff himself treats it as necessary for the holder of a dishonoured *hundi* to give notice of dishonour to his immediate indorsor. The second paragraph is not candid, for it alleges that the *hundi* was handed to the drawee for the purpose merely of being copied, while in fact it was presented for acceptance or payment; and the third paragraph sets up a custom to the effect that on a *hundi* being fraudulently detained by any of the parties to it, each indorsor is bound to give a *peth* or duplicate of the *hundi* to his immediate indorsee.

The plaint seems to have been framed with a double aspect. The first branch alleges dishonour of the bill, and notice of that fact to the defendant; while the second branch avers loss of the bill, and a consequential liability on each indorsor

(*i*) 6 Bom. H. C. Rep., O. C. J. 24.

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to give a *peṭh*; and it then goes on to allege a custom (which apparently goes further than the necessity of the case) that on a fraudulent detention of the *hunḍi* by any of the parties to it, each indorsor is bound to give a *peṭh* to his immediate indorsee.

No evidence in the present case has been given of the existence of such a custom, nor is it necessary for us to give an opinion as to whether there is such a custom known to the Hindú-law merchant, for there is no allegation in the plaint that the *hunḍi* was in fact fraudulently detained by the drawee —the second paragraph, on the contrary, alleges that the *hunḍi* was lost, not that it was fraudulently detained; but even if we were to hold that there is such a custom amongst Hindú merchants, and the fact of a fraudulent detention of the *hunḍi* were alleged or proved, it would not benefit the plaintiff: for there is no allegation, much less proof, nor has it even been contended, that the fact of such fraudulent detention was communicated to the defendant, which it would clearly lie upon the plaintiff to do, in order to entitle himself on that account to demand a *peṭh* from his indorsor. The evidence, on the other hand, goes to show that the verbal notice given to the defendant was notice of loss, but the plaintiff cannot rely upon that, for no proof has been given of loss, nor could there be, as the *hunḍi* in fact was not lost. Whether, therefore, the right of the plaintiff to demand a *peth* is rested upon the loss or the fraudulent detention of the *hunḍi*, the second branch of his case must necessarily fail.

Then as to the first branch of the plaintiff's case. Has reasonable notice of dishonour been given to the defendant? The Hindú-law merchant on this point is not so strict as the English-law; reasonable, not immediate, notice of dishonour is all that the Hindú law requires. What notice then was there of dishonour? The Haidarábád firm asks the Bombay firm to send a duplicate of the *hunḍi*, and in the letter in which they make that request it is to be observed that nothing is said of the loss of the *hunḍi*. The plaintiff then sends the letter of the 22nd of April, in which he alleges that the

hunḍi has been lost, and demands a *peṭh* from the defendant. What would the defendant conclude from that? Certainly not that the *hunḍi* had been presented to the drawee and refused acceptance or payment, but rather that the plaintiff wanted a *peṭh* for the purpose of presenting it to the drawee. There is not a word in the letter to lead to the inference that the drawee had ever seen the *hunḍi*, or that the loss (if any) occurred after it had been so seen. Asking for a duplicate of a lost bill cannot, in our opinion, be deemed notice of dishonour. In the present case, therefore, there has been no notice of dishonour, and the plaintiff must fail on the first branch of his plaint, as well as upon the second. That is sufficient to dispose of the case, but I may add that it is the strong impression of the Court that there was some dispute at Haidarábád, between the plaintiff and the drawee of the *hunḍi*, whether payment of it should be made, or credit only given; and the plaintiff is keeping back the facts from the knowledge of the Court. The letter that has been produced merely asks for a *peṭh*, and does not state the reason for requiring it. No writing has been produced by the plaintiff to show from the correspondence why the duplicate was required, and it is probable that the plaintiff is keeping back the correspondence on the subject. The plaintiff has not been candid either with the defendant or the court. He has failed to show notice either of dishonour or fraudulent detention; and having thus failed upon both branches of his case the decree must be reversed, and the plaintiff must pay the costs of this appeal, as well as those in the Division Court.

GREEN, J., concurred.

Decree reversed with costs.

Attorney for the appellant: *Khanḍeráv Moroji.*

Attorney for the respondent: *C. Tyabji.*

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Suit No. 810 *of* 1870.

BLACKWELL AND CO. .....*Plaintiffs.*

JONES AND CO. .....*Defendants.*

Shipping—Charterparty—Nomination of Ship's Agents by Freighters —Right of Ship's Agents to sue on the Charterparty—Parties within the consideration of Charterparty—Mercantile expression "going seeking."

A charterparty made between the defendants (the owners of the *Seaforth*) and H. & Co. (the freighters) provided that "the owners should employ at the ports of discharge the consignee nominated by the freighters to transact the ship business there inwards and outwards on the customary terms, not exceeding 2½ per cent. on amount of freight payable inwards and 5 per cent. outwards.

H. and Co. nominated the plaintiffs to transact the ship's business in Bombay (a port of discharge) with the knowledge and consent of the master of the *Seaforth*, and the plaintiffs accepted and acted under such nomination.

The defendants refused to pay the plaintiff's commission on the outward freight of the *Seaforth*, on the ground that, under the circumstances under which such freight was procured, the plaintiffs were not, under the charterparty, entitled to receive commission on it.

Held that the plaintiffs were sufficiently within the consideration of the charterparty to maintain a suit for the breach of such clauses of it as were inserted for their benefit.

Meaning of the mercantile expression of (a) ship "going seeking" discussed.

THIS was a suit brought by the plaintiffs against Messrs. T. C. Jones and Co., of Liverpool, owners of the ship *Seaforth*, and alleged to be carrying on business in Bombay by their agent, T. E. Terfry, the master of the *Seaforth*, to recover the sum of Rs. 2,363.

The defendants, Messrs. T. C. Jones and Co., for the owners of the ship *Seaforth*, entered into a charterparty, dated the 12th of April 1870, with Messrs. T. H. Haviside and Co., of London, to charter the *Seaforth* to them for a voyage from London to Bombay at the rate of thirty shillings per ton.

The charterparty, after providing that "the *Seaforth* (having taken in cargo in London as specified in the charterparty) should proceed therewith to Bombay *viâ* the Cape of Good Hope, and there deliver the same as customary" (the act of God, the Queen's enemies, &c., excepted), and,

after providing for the storage of the cargo, and for its delivery at Bombay, and for the payment of the freight, contained the following clause:—

"Owners to employ at the ports of discharge the consignee nominated by freighters to transact the ship's business there, inwards and outwards, on the customary terms, not exceeding 2½ per cent. on amount of freight payable there inwards, and 5 per cent. outwards, which is to include all charge for Native brokerage, but ship not to be bound to load in Bombay, and to pay no outward commission if she goes away seeking."

The *Seaforth* arrived in Bombay in the early part of October 1870. On the 12th of August the freighters, Messrs. T. H. Haviside & Co., wrote a letter addressed to the plaintiffs in the following terms:—

"*Viâ Marseilles.*

London, 12th August 1870.

Messrs. BLACKWELL & Co.,

Bombay.

DEAR SIRS,

We have the pleasure to introduce to you Captain Terfry, of the ship 'Seaforth,' owned by Messrs. T. C. Jones and Co., of Liverpool.

We have loaded this vessel for Bombay, and, as empowered by Charter-party, have much pleasure in naming you as Agents for the owners for the transaction of ship's business whilst in Bombay, and we have no doubt you will give your best attention to their interest, and extend, to Captain Terfry a share of your usual courtesies.

We remain, &c.,
For T. H. Haviside & Co.,
HENRY SMITH."

This letter was handed by Terfry, the master of the *Seaforth*, to the plaintiffs shortly after the arrival of the ship in Bombay.

The plaintiffs accepted this nomination, and under it transacted the ship's business in Bombay, and collected the freight there payable on the outward voyage, which was, however, very trifling in amount. About a fortnight after the arrival of the *Seaforth* in Bombay, Captain Terfry informed the plaintiffs that his ship had already been chartered in England, and showed them a charterparty made between the defendants and Messrs. Mohr Brothers & Co., dated the 4th of June 1870, which provided that the *Seaforth* should proceed to Bombay

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with cargo for the owners' benefit, and, having discharged the same, should sail and proceed to Akyab for orders to load, either there or at Rangoon or at Bassein, but to load at one port only, a cargo of rice or other lawful merchandise, at certain specified rates of freight, and then proceed to Cork or Falmouth for orders as to the port of discharge.

The plaintiffs were ready and willing to procure, and could have procured, a homeward freight for the *Seaforth* in Bombay. At the time the suit was filed, the *Seaforth* was about to sail to Akyab, under the above charterparty of the 4th of June. The plaintiffs claimed, under the charterparty of the 12th of April 1870, five per cent. commission on the amount of freight to be earned under the charterparty of the 4th of June 1870, which, according to the plaintiffs' particulars of demand, amounted to Rs. 2,337-8-0.

The plaintiffs also claimed Rs. 25-8-0, due to them for commission on inward freight collected by them, and for some small disbursements which they had made on account of the ship.

The latter sum (Rs. 25-8-0) the defendants tendered to the plaintiffs before action, and after suit paid it into court.

The defendants put in a written statement, in which they stated that the ship *Seaforth* was not about to load in Bombay, and that, under the terms of the charterparty in the plaint mentioned, the defendants were not liable to pay to the plaintiffs any commission to be earned by the said ship under the charterparty of the 4th of June 1870.

By paragraph 5 of the written statement, the defendants submitted that the plaintiffs had no title in themselves wherein to maintain the suit, and no consideration moved from the plaintiffs for the payment of the sum claimed from the defendants by the plaintiffs.

The suit came on for hearing before GREEN, J., on the 1st of December 1870, when the following issues were raised :—

I. Whether the plaintiffs have any title to sue the defendants in respect of the causes of action alleged in the plaint other than in respect of Rs. 25-8-0.

II. Whether the plaintiffs are entitled to recover the sum of Rs. 2,337-8-0 in the plaint claimed, or any part thereof.

Mayhew and *Lang*, for the plaintiffs, contended that the plaintiffs, though not originally parties to the contract, were yet entitled to sue upon it without joining Messrs. Haviside & Co. as co-plaintiffs, having been nominated under its provisions as agents for the owners. They cited *Jones* v. *Robinson* (*a*), *Robertson* v. *Wait* (*b*).

The Honorable A. R. Scoble and *Latham*, for the defendants, relied upon *Tweddle* v. *Atkinson* (*c*); Chitty on Contracts, pp. 53-55 (8th ed.); Addison on Contracts, p. 1038 (6th ed.).

Cur. adv. vult.

Dec. 3. GREEN, J. (after stating the facts, as given above, proceeded):—The issues settled at the hearing which took place on Thursday last, the 1st instant, are as follows:—(1) Whether the plaintiffs have any title to sue the defendants in respect of the causes of action alleged in the plaint other than in respect of Rs. 25-8-0; and (2) whether the plaintiffs are entitled to recover the sum of Rs. 2,337-8-0 in the plaint claimed, or any part thereof.

In reference to the first issue, it was contended, on the part of the defendants, that the plaintiffs, not being parties to the charterparty of the 12th of April, and being strangers to the consideration thereof moving to the defendants, are not entitled to sue, and that the suit, if maintainable at all, should have been brought in the name of Haviside and Co. I had felt some difficulty on this point when the plaint was first presented to me, but on further consideration the difficulty has been to a great extent removed. The provision as to the

(*a*) 1 Exch. 454. (*b*) 8 *Ibid.* 299.
(*c*) 1. B. & S. 393.

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employment, as agents of the owners, of consignees nominated by the freighters, and payment of commission to them, seems to amount to this: "We, the owners, will employ such persons as agents as you, the freighters, shall name, and on their acceptance of the nomination and acting as agents we will allow a certain commission." The freighters then nominate the plaintiffs as agents, with the knowledge and assent, if not of the owners themselves, at least of the captain, and the plaintiffs accept such office, do such business as is necessary to be done, and are ready and able to perform the only remaining duty—namely, procure homeward freight for the ship—and the only reason they do not do this is that the owners chose to do it for themselves in England. This provision in the charterparty was, I consider, intended to be acted upon by the nomination of agents, and when so acted upon by the nomination of the plaintiffs as such agents became a provision for the benefit and on behalf of the plaintiffs, and in fact to the extent of the provision I consider that upon acceptance of such nomination there was constituted a valid and binding legal contract against the owners in favour of the plaintiffs as such nominees. Though the plaintiffs are not named parties to the contract, yet they are not in that sense strangers to the consideration of the contract as to prevent them suing on it in their own name as to such part as is for their benefit and on their behalf.*

With regard to the second issue, evidence has been given on the plaintiffs' behalf by three witnesses—Mr. Herring, one of the plaintiffs, Mr. Thomas Blay, a ship and freight broker, and Mr. Andrew Cunningham, an assistant in the firm of Messrs. Wallace & Co. They have given evidence as to the usage of the port in regard to agents' commission on freight; but in the present case, where the claim is based on a written contract, the evidence of general usage is material only as showing the mercantile meaning or acceptance of any terms used in that contract. These witnesses all agree in this, that the term "a ship going seeking" means a ship leaving Bom-

* *On this point see further* In re *Agra and Masterman's Bank* ex parte *Asiatic Banking Corporation, Law Rep.* 2 *Ch. App.* 397.

bay in ballast or unfixed, and without a charter or freight provided for her, either here or at another port. Apart from any special mercantile use of the words, I should have thought that a ship goes seeking as well in the case of leaving the port without having loaded there, but with a certain expectation of finding freight elsewhere, as in the case where she so leaves without any such certain expectation. But the witnesses whom I have mentioned (and whose evidence has not been in any way contradicted, for the defendants have not called any witnesses) state that the mercantile meaning of the words is that a ship is said to go away seeking only where she leaves without any charter or freight having been engaged. If this be so, the *Seaforth* cannot be said to be now going seeking, as she is leaving the port under a charterparty by which she is to proceed to Akyab for orders, and there, or at certain other specified ports, to load for the homeward voyage—and indeed the freighters have the option of loading the ship at Bombay. It was urged (among other things), on behalf of the defendants, that the plaintiffs had done nothing whatever to earn any commission on homeward freight, and that the engaging or procuring of such freight is, as Mr. Herring states, the only duty an agent outwards has ordinarily to perform with respect to the ship. But I cannot consider that this is the test. The plaintiffs, according to the evidence, were willing and able to have procured homeward freight for the ship either from Bombay or from other ports in the East. Had the owners without any intervention of the agents procured a charterparty in Bombay for the ship to load here, it is not, I suppose, disputed that the agents would be entitled to their commission on freight though they did nothing for it; and I cannot, therefore, consider the question whether or not the agents in fact procured the freight as decisive on the question of their right to commission. On the evidence which has been given, I find myself unable to come to any other conclusion than that the plaintiffs are entitled to commission on the freight to be earned under the charterparty of the 4th of June. Evidence has been given as to the usual mode of estimating such commission, and that the amount claimed

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is correct according to such mode of estimate. The claim is based upon the lower rate of freight mentioned in the charterparty; and I must find the second issue in favour of the plaintiffs, and make a decree in favour of the plaintiffs for Rs. 2,337-8-0, being the amount (Rs. 2,363) claimed, less the sum of Rs. 25-8-0 paid into court, and that the sum so paid into court be paid out to the plaintiffs, if not already paid, and costs.

Attorneys for the plaintiffs: *Rimington, Hore, and Langley.*

Attorneys for the defendants: *Dallas and Lynch.*

Dec. 23.

Suit No. 179 *of* 1865.

LA'DKUVARBA'I, widow .....*Plaintiff.*
GHOEL SHRI' SARSANGJI PRATA'BSANGJI .....*Defendant.*

Independent Sovereign Prince—Privilege from Suit—International Law —Pálitáná, Thákur of — Káttiáwád, Chiefs of — Misdescription of Defendant—Decree made by mistake—Execution, Stay of.

An independent Sovereign Prince is privileged from suit in the Courts of British India.

The Thákur of Pálitáná is an independent sovereign prince.

A suit was brought against the Thákur of Pálitáná (his title being omitted from the plaint), and an *ex parte* decree was obtained against him. An application on the part of the Thákur to have the decree set aside was dismissed, and the plaintiff then sued out an attachment, but, failing to execute it within a year, was compelled to apply to the Court, under Sec. 216 of the Code, for leave to execute it. The defendant at the same time applied to have the attachment and all proceedings under it declared null and set aside.

The Court (without expressing an opinion as to whether the order dismissing the application to have the decree set aside would have prevented it from declaring the decree void *ab initio*) *held* that, as the decree was made erroneously and without jurisdiction, it would not, when apprised of the error, assist the plaintiff in carrying it into execution in a case in which lapse of time made it incumbent on the plaintiff specially to invoke the aid of the Court for that purpose.

THE plaintiff in this suit sued as widow and executrix of Ratanji Rupji Modi. She was described in the plaint as formerly residing in a house No. 18 in Báláji Shámseț Street

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in Bombay, but as residing at the time the suit was brought at Gogo, in the zillá of Ahmedábád, and carrying on business in Bombay under the name of Ratanji Rupji Modi by means of her *munim*, Bhagvándás Visandás.

The defendant was described as "Ghoel Shrí Sarsangji Pratábsangji, Hindú inhabitant of Pálitáná, in the zillá of Rájkoṭ, but now residing in a house No. 4 on the Breach Candy Road."

The plaintiff claimed to recover Rs. 16,091 1 qr. 62 reas upon the common counts for goods sold and moneys lent, &c., and upon an account adjusted and signed by the defendant's agent in Bombay, with interest at nine per cent. upon the amount of the adjusted account from the 12th of November 1863 (the date of the adjustment) till payment.

The items of the account, which was a long one and extended over a space of about three years, were principally small sums of money paid in cash, and charges for miscellaneous articles such as lamps, cloth, pearls, gold paper, &c. The writ of summons first taken out by the plaintiff was not served. A second writ, tested the 30th of October 1865 and sealed on the 31st of that month, was sent to the Magistrate at Gogo to be served on the defendant, but was returned by him unserved, as the defendant did not reside within his jurisdiction. It was then, on the 6th of December 1865, in accordance with the provisions of Sec. 66 of the Civil Procedure Code, forwarded by the Prothonotary through the Post Office in a registered cover addressed to the defendant at Pálitáná, and was received by the defendant on the 11th of December 1865. The summons was made returnable on the 23rd of December.

The case, having been set down as a long cause, came on for hearing before Sir Joseph ARNOULD on the 14th of April 1866, when an *ex parte* decree was passed in favour of the plaintiff for the amount claimed by her, with interest and costs. On the 10th of December 1868 a rule *nisi* was granted by Sir Joseph Arnould, calling upon the plaintiff to show cause why the decree of the 14th of April 1865 should not be set aside. The material portions of the affidavit of Sarupchand

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Máṇikchand, upon which the rule *nisi* was granted, and of the affidavits filed in reply, are set forth in the judgment of the Court (see *post*, p. 159).

Cause was shown against the rule *nisi* on the 20th and 22nd of December 1868, when it was adjourned, and leave to file additional affidavits was granted, and finally, on the 2nd of February 1869, the rule was discharged with costs, apparently on the ground that the application to set aside the decree on account of the misdescription of the defendant in the proceedings was too late.

Subsequently an order in chambers was made by WESTROPP, J., on the application of the plaintiff's attorney, directing the decree of the 14th of April 1868 to be transmitted for execution to the District Court at Ahmedábád.

As more than a year had elapsed from the date of the decree, the plaintiff applied to the court at Ahmedábád to issue a notice to the defendant, under Sec. 216 of the Code to show cause why the decree should not be executed against him. The Court at Ahmedábád referred the plaintiff to the High Court as the proper court to which such application should be made. Accordingly, on the 12th of February 1870, Sir Charles SARGENT granted a summons, under Sec. 216, calling on the defendant to show cause why execution should not issue; but before the summons came on for hearing, on the 7th of March 1870, WESTROPP, J., granted the defendant a rule *nisi* calling upon the plaintiff to show cause why the decree of the 14th of April 1866, and the execution issued thereon, should not be set aside, or why an order should not be made by the court directing that the execution and the proceedings thereunder should not be sent for, for the purpose of being set aside or suspended, or why the petitioner should not have leave to present an appeal from the order of Sir Joseph Arnould of the 2nd of February 1869, or why such other order should not be made as to the court might seem fit.

The last-mentioned rule *nisi* was made on the petition of the defendant, verified by his agent, Sarupchand Máṇik-

chand, in which it was stated that the petitioner was an independent prince or ruler of the State of Pálitáná, owing no allegiance to Her Majesty, and that he was, and always had been, domiciled at and resident within his State, and beyond the jurisdiction original and appellate of the High Court.

That the independence of the State of Pálitáná and of the Thákur or Rájá thereof for the time being had never been denied or questioned by the British Crown, but had, on the contrary, always been, by public records and other acts of State of the British Crown, admitted and acknowledged, and especially by the treaties subsisting between the Crown and the State of the petitioner, whereby they were reciprocally entitled, the former to tribute, and the latter to protection. That the petitioner and his predecessors had always been, and were properly, described not only by their personal and proper names and the names of their family, but also by the prefixes and affixes employed amongst Hindús generally and Rájputs to denote the royal rank of Thákur or Rájá, and that the proper name and title of the petitioner was "Thákur Ghoel Shrí Sarsangji Pratábsangji."

That the petitioner had never consented to be sued in the present suit, and had never in any way attorned to the jurisdiction of the court. The petition then set out the proceedings had in the suit, and prayed for the relief mentioned in the rule *nisi*.

It was arranged between the parties that the hearing of the summons granted by Sir Charles Sargent on the 12th of February 1870, and of the cause to be shown against the rule *nisi* made upon the above petition, should come on together.

The hearing of the above matter first came on before COUCH, C.J., and WESTROPP, J., in March 1870, but, the hearing not having been then completed, the case finally was argued before WESTROPP, C.J., and MELVILL, J., on the 27th of June and 4th of July 1870.

The Honorable A. R. Scoble (Acting Advocate General), with him *Macpherson*, showed cause :—The order of Sir Joseph

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Arnould made in this matter is binding upon this court, which is not sitting as a court of appeal. The time for asking for a review of that order has long since elapsed, and the delay has not in any way been accounted for. On the substantial question raised by the petition, we contend (I.) that in respect of such a cause of action as the present a sovereign prince is liable to be sued in the courts of a foreign country. (II.) That the Thákur of Pálitáná is not an independent sovereign prince in such a sense as to exempt him from liability to be sued in Her Majesty's Courts.

Sovereign princes have been brought before the courts in England with varying results: *see The Duke of Brunswick v. The King of Hanover* (*a*); and we contend that where an act in respect of which a sovereign is sued is not a political one, and is unconnected with the government of the State of that sovereign, and has not been done by him in his sovereign capacity, but acting merely as a private individual, in respect of such act that sovereign is liable to be sued in the same way as a private individual, if in other respects he is within the jurisdiction of the court in which he is sued. Thus H. H. the Holkar, who used to carry on trade in Bombay, has frequently sued and been sued in this court. [WESTROPP, C J., pointed out that H. H. the Holkar had never objected to the jurisdiction, but had in fact attorned to it.] On this point the following authorities were also referred to:—*Taylor* v. *Best* (*b*); *Magdalena Steam Navigation Company* v. *Martin* (*c*); *In re Wadsworth* v. *Queen of Spain*, and *DeHaber* v. *Queen of Portugal* (*d*); *Munden* v. *Duke of Brunswick* (*e*); *Secretary of State for India* v. *Kamachu Boye Sahaba* (*f*); *King of Spain* v. *Hullet* (*g*); *The Emperor of Austria* v. *Day* (*h*).

We also contend that the Thákur of Pálitáná is not an independent sovereign prince. He is habitually obedient to the British Crown, represented by the Political Agent for the

(*a*) 6 Beav. I.; 2 Ho. Lo. Ca. 1.
(*b*) 23 L. J. C. P. 89.
(*c*) 28 L. J. Q. B. 310.
(*d*) 17 Q. B. 171.
(*e*) 10 Q. B. 656.
(*f*) 10 Moo. P. C. C. 22.
(*g*) 1 Cl. & F. 333.
(*h*) 30 L. J. Ch. 690.

time being. He pays tribute to the Crown, to which also he owes allegiance. He has by the Crown been deprived of the right to inflict capital punishment within his own nominal dominions. The following records and authorities were referred to in support of the above propositions :—Austin on Jurisprudence, Vol. I., Ch. VI., pp. 226, 227 (ed. of 1870); Aitchison's Treaties, pp. 361, 365, 366, 369; Thomas's Treaties, pp. 232, 234; Colonel LeGrand Jacob's Report and Captain Barr's Report, Bombay Selections XXXVII., N. S., *passim*. The case of *Jwala Pershad* v. *The Rana of Dholapore* (*i*) is in a different position from this. See Aitchison's Treaties, Vol. IV., pp. 106, 108; *Raja of Jipperah's case*, cited at p. 16 of Macpherson's Code. Public policy does not require the Chiefs of Káṭṭiávád to be exempt from Civil jurisdiction; on the contrary their great numbers and the smallness of their States render it desirable that they should not be so exempt. 6 Aitchison, 363. They cited also Selden's Table Talk.

Anstey (with him *McCulloch*), in support of the rule:—The order of Sir Joseph Arnould is not a bar to the present application of the defendant. That order was one refusing to set aside an *ex parte* decree, on the ground that the application was too late. We now ask that the decree may be declared void *ab initio*, as having been made without jurisdiction. The nature of the two applications is wholly distinct. The courts will always declare void a decree which has been obtained by fraud or misrepresentation, as in the present case : *Duchess of Kingston's case* (*j*), *Sheddon* v. *Patrick* (*k*); or will not give effect to it : *Philipson* v. *The Earl of Egremont* (*l*); *Bradley* v. *Eyre* (*m*); *Earl of Bandon* v. *Becher* (*n*). If there is any provision in the Civil Procedure Code which would give effect to a decree against an independent sovereign, it is void as being *ultra vires*. If an act is *ultra vires* the courts will treat it as a nullity : *Bonham's Case* (*o*); *City of London* v. *Wood* (*p*); *Earl of Lincoln* v. *Heyden* (*q*); Forsyth's Opinions on Constitutional Law, p. 31.

(*i*) S. D. A. (N. W. P.) 1863, p. 579.
(*j*) 2 S. L. Ca. 679. (*k*) 1 Macqueen, 535. (*l*) 6 Q. B. 587.
(*m*) 11 M. & W. 432. (*n*) 3 Cl. & F. 479. (*o*) 8 Rep. 118 (*a*).
(*p*) 12 Mod. 687. (*q*) Plow. 398.

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He also cited *Forbes* v. *Cochrane* (*r*); *The Fox* (*s*); *The Queen* v. *Serva* (*t*); *Heathfield* v. *Chitton* (*u*); *Trickett* v. *Bath* (*v*); *Barbini's Case* (*w*); *The Sussex Peerage Case* (*x*); 4 Blk. Com. 67.

A sovereign prince is absolutely exempted from suit in the courts of foreign nations. This is shown by the cases, cited for the plaintiff, *Taylor* v. *Best*; *The Magdalena*; *The Duke of Brunswick* v. *The King of Hanover*; Phillimore on International Law, Vol. II., pp. 118, 119.

And this doctrine has been recognised and acted upon in the courts in India: *Jwala Pershad* v. *H. H. the Rana of Dholapore* (*y*); *Balkrishna Purshotum* v. *The Rajah of Juvan*, a case decided in the Small Cause Court by the Chief Judge, Mr. Hore, reported in the *Bombay Gazette*, 25th February 1864; *The Queen* v. *Vencanna* (*z*).

The defendant has been acknowledged as an independent sovereign prince by the British government; if he had not been so acknowledged it might be necessary to prove the fact by evidence: *City of Berne* v. *The Bank of England* (*a*); *Yrisarri* v. *Clement* (*b*); Taylor on Evidence, Pt. I., Ch. II., para. 4; Goodeve on Evidence, p. 309; *Le Louis* (*c*). The correct definition of a State (Civitas) is given by Mr. Phillimore in his work on International Law, Vol. I., p. 77. His definition coincides with that of Vattel, lib. i., c. i., ss. 4 and 7; *see* too Grotius, Bk. I., Ch. III., s. 1. The definition of Mr. Austin is that of a philosopher, not that of a practical jurist. Besides, he subsequently qualifies his definition. The Thákur of Pálitáná is not a feudatory of the British Crown. If he owes homage it is only liege homage, and he is not, therefore, a subject: I. Hale, Pleas of the Crown, pp. 68, 70, 74. He is one of a confederacy of princes of which the Queen is the chief. He pays tribute, but is not the less independent on that account. The kings of England prior to

(*r*) 2 B. & C. 444, 470.
(*s*) Edward's Rep. 312.
(*t*) 1 Den. Cr. Ca. 104.
(*u*) 4 Burr. 2016.
(*v*) 3 *Ibid.* 1480.
(*w*) Forrester 282.
(*x*) 11 Cl. & F. 85, 137.
(*y*) S. D. Rep., N. W. P. 1863, Pt. I. 579.
(*z*) 3 Mad. H. C. Rep. 351.
(*a*) 9 Ves. 347.
(*b*) 3 Bing. 432; 2 Car. & P. 223.
(*c*) 2 Dodson 201, 393.

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Edward III. did homage to the kings of France and paid tribute to the Pope: Rymer's Fœdera, 9, 24, 33, 35 *et passim*: Acta Regia. Her Majesty may afford him protection, but allegiance and protection are not reciprocal: *Calvin's case* (*d*); Grotius, lib. 1, c. 3, s. 7. The Report of Colonel Walker shows clearly the position of the defendant: Bombay Selections, Vol. XXXIX., also Colonel Jacob's Report, Bombay Selections XXXVII., Colonel Barr's Report, *ibid.* He also referred to Thomas's Treaties, p. 232; Thornton's Gazetteer, tit. Talooka, and Wilson's Glossary. A Prince bearing the title of Thákur must not be denied his title: Phil. In. Law, Vol. II. pp. 118, 119; Act III. of 1864; and 21 & 22 Vict., c. 106, were also referred to.

Cur. adv. vult.

Dec. 23.

WESTROPP, C.J.:—The first writ of summons in this suit was never served. A fresh writ of summons, tested 30th and sealed 31st October 1865, was issued, returnable on the 23rd of December 1865. The plaintiff made an attempt to cause it to be served through the Magistrate of Gogo, but it was returned by him unserved, as the defendant did not reside within his district. It eventually was served through the Post Office, under Sec. 60 of the Civil Procedure Code, upon the defendant at Pálitáná. The defendant, in his petition filed on the 7th of March 1870, states, too unfavourably to himself, that this service was had upon him on the 6th of December 1865. It was, however, upon that day only despatched from the Prothonotary's Office by post, and did not reach the defendant until the 11th of December 1865, as appears by the letter of the Postmaster of Bombay, dated 20th December 1865, and appended to the affidavit of Jagjivan Hemji, made on behalf of the plaintiff. From the 11th to the 23rd December 1865, the day on which the summons was returnable, was not a sufficient period to allow to a defendant residing in Káṭṭiáváḍ to appear and defend a suit brought against him in Bombay. The plaintiff, therefore, was blameable in deferring the service of a summons issued in

(*d*) 7 Rep. 1.

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October until December 11th, twelve days before it expired. True, this was a long cause, and being such could not in the usual course, in consequence of the arrear of long causes in our lists, have come on for hearing upon the day of return, and Her Majesty's subjects are expected to know this. But it would be highly unreasonable to expect that an independent Native Chief, residing in his own territory, should know it. The plaintiff does not appear to have sent him any notice that the cause would come on upon a day subsequent to that named in the summons. The cause was heard by Sir Joseph Arnould on the 14th of April 1866, and a decree then made against the defendant. Putting aside the delay in the service of the writ of summons, there is, in the conduct of the plaintiff, a point calling for much more serious animadversion. She, in the writ of summons and plaint, and all of the proceedings in the suit, has described the defendant simply as "Ghoel Shrí Sarsangji Pratábsangji, Hindú inhabitant of Pálitáná, in the zillá of Rájkoṭ, but now residing in a house No. 4 on the Breach Candy Road in Bombay." She has wholly omitted to state that he is Thákur or Chief of Pálitáná. There was nothing in the description which she caused to be given of him to distinguish him from any ordinary individual, or to warn the court that the suit was brought against a Native Chief. Had the true description of him been given in the plaint, the Judge to whom it was presented would in all probability have rejected the plaint, or at least deferred the acceptance of it until he had ascertained whether such an action could properly be entertained by the High Court. It is difficult to believe that the plaintiff has not intentionally concealed from the court the rank and position of the defendant, in order to enable her to obtain a decree against him. There is not any evidence before the court to show that the defendant ever resided, as described in the plaint, at Breach Candy, or elsewhere in the island of Bombay, and it was not contended by the plaintiff's counsel that the defendant ever did reside in Bombay.

On the 10th of December 1868 the defendant obtained from Sir Joseph Arnould a rule *nisi*, calling upon the plain-

tiff to "appear and show cause, if any she hath, why the decree passed in this cause on the 14th of April 1866 should not be set aside." That rule was founded upon an affidavit by Sarupchand Máṇikchand, in which it was stated that the action had been brought in respect of goods sold and delivered, and moneys lent to, and paid for, the defendant in Bombay by the plaintiff, and money due to her from the defendant upon accounts settled, adjusted, and signed by the agent of the defendant in Bombay. The same affidavit also stated, on information and belief, that the plaintiff fraudulently described the defendant in the plaint as an inhabitant of Pálitáṇá, instead of Rájá or Thákur of Pálitáṇá, with a view to his being made amenable to British courts of justice, and that the writ of summons did not reach him sufficiently soon to admit of his appearance in the High Court on the day on which that writ was returnable; and that the account sued upon was not adjusted by a constituted attorney of the defendant, and that he had a good defence to the action; and alleged that the defendant, being a Native independent Chief of the second grade in Káṭṭiávád, is not amenable to British courts of justice.

To these allegations the plaintiff's assistant in business, Jagjivan Hemji, by affidavit replied that the defendant had in Pálitáṇá requested him to cause the plaintiff to lend to Rámkrishṇa Jairám, the defendant's agent in Bombay, such moneys as he might from time to time require in Bombay on behalf of the defendant; and that for that reason, and on the faith of a letter to the same effect addressed by the defendant to the plaintiff, and delivered to her by Rámkrishṇa Jairám, she had paid moneys to Rámkrishṇa Jairám and purchased goods as required by him from time to time on account of the defendant, and that he (Rámkrishṇa Jairám) adjusted with the plaintiff's *munim*, and signed, an account of these transactions in her book, whereby a balance of Rs. 16,091 1 q. 62½ reas was found due to the plaintiff by the defendant, to recover which sum this action was brought. In the same affidavit it was in effect denied that the defendant was fraudulently described as an inhabitant of Pálitáṇá,

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instead of Thákur of Pálitáná, in the plaint, and averred that he was so described because he was residing there and dealing in Bombay by means of his agent. It then, after referring to the service of the writ of summons on the defendant at Pálitáná on the 11th of December 1865, and to the fact that the decree was not made until the 14th of April 1866, and asserting that Rámkrishṇa Jairám was the lawfully constituted agent in Bombay of the defendant, stated that the defendant was served through the post with the warrant to tax the plaintiff's costs, and had not, until the obtaining of the rule *nisi* of the 10th of December 1868 from Sir Joseph Arnould, made any objection to the decree, and that for the foregoing reasons, the defendant was amenable to British courts of justice. This affidavit lastly stated that the defendant was about to visit Broach to be present at the Exhibition, and that the plaintiff intended to apply for execution of her decree through the District Court at Broach, and that the defendant had no property within the jurisdiction of this court, and unless the plaintiff were allowed to enforce her decree through the Broach court when the defendant should "come within its jurisdiction, the plaintiff would be left without any remedy or means of recovering her money." This showed plainly that it was the intention of the plaintiff, if she could, to have the defendant arrested immediately upon his setting foot on British territory. Rámkrishṇa Jairám made an affidavit on behalf of the plaintiff nearly to the same effect as that of Jagjivan Hemji, and added that he (Rámkrishṇa) had been examined *vivâ voce* as a witness for the plaintiff at the hearing of this cause on the 14th of April 1866, when Sir Joseph Arnould made a decree for the amount claimed.

Sarupchand Mánikchand, by another affidavit, asserted that the defendant is the reigning Thákur of Pálitáná, belongs to the Ghoel Rájput tribe, a branch of the Bháunagar family, and has been always addressed by the Government as Chief of Pálitáná. It then stated that he was son of the late Thákur Pratábsang, who was eldest son of Noganji, Thákur of Pálitáná in 1854, mentioned in Captain Barr's

Report,* and that the defendant pays tribute to the British government *on behalf of the Nawáb of Junágaḍ and the Gáikwáḍ*, and enjoys second class jurisdiction as an independent Native Chief, in support of which the affidavit referred to the following certificate :—

"Certified that Ghoel Shri Sarsangji Pratábsangji is a Native Chief of Káṭṭiáwáḍ, having a second class jurisdiction.

(Sd.) "W. W. ANDERSON, Political Agent.

"*Káṭṭiáwáḍ, Political Agent's Office, Camp, Broach, 26th December* 1868."

Upon these affidavits, Sir Joseph Arnould, on the 2nd February 1869, discharged with costs the rule *nisi* of the 10th of December 1868 to set aside the decree. We have not any note of his judgment on that occasion, but are inclined to believe that he must have chiefly rested his decision on the lateness of the defendant's application, and upon his not having excused his delay, or shown that he had a good defence on the merits to the claim of the plaintiff. Notwithstanding some of the passages in the affidavits referred to, we cannot think that the learned Judge's attention was as fully directed to the question of the jurisdiction of the High Court over the defendant as that of my brother Melvill and myself has been upon the present occasion.

Subsequently, an order in chambers was, by the plaintiff's attorney, obtained from myself, as sitting judge, that the decree of the 14th of April 1868 should be transmitted by the Prothonotary to the District Court at Ahmedábád, to enable the plaintiff to apply to the proper court in that district for execution against property of the defendant alleged to be within its jurisdiction. The plaintiff's attorney did not inform me of the attempt which had been made before Sir Joseph Arnould to set aside the decree, nor that the defendant was Thákur of Pálitáná or a Native Chief of Káṭṭiáwáḍ. Had I been then informed of the political status of the

* See Bombay Government Records, Printed Selections, No. XXXVII. N. S., p. 135.

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defendant, I should have declined, on the ground of our want of jurisdiction to entertain the suit, to give any aid to the plaintiff towards obtaining execution of her decree.

Afterwards it would appear that, in consequence of the lapse of more than a year since the date of the decree, and of no execution having issued upon it, the plaintiff applied to the court at Ahmedábád to issue a notice, under Sec. 216 of the Civil Procedure Code, to the defendant, to show cause why the decree should not be executed against him. That court properly held that such a notice can be issued only by the court which made the decree.

On the 12th of February 1870, the plaintiff, accordingly, applied in chambers to Sir Charles Sargent, as sitting judge of this court, for, and obtained, a summons to the defendant to show cause on the 5th of March why the decree should not be executed against him, and why he should not pay the costs of that summons and of such execution. The matter came before our brother Bayley on the 5th of March, and, it being then stated to him that the defendant was immediately about to make a further application to the court to set aside the decree or stay the execution of it, it was agreed that the summons should be adjourned into court to be heard and disposed of together with that application.

In pursuance of that arrangement, the defendant's agent, Sarupchand Máṇikchand, on the 5th of March, by solemn affirmation, verified a petition on behalf of the defendant. Its prayer was moved before myself in court, and upon the 8th of March I made upon it, in the terms of its prayer, an order *nisi*, that the plaintiff should show cause why the plaint, proceedings, orders, and the decree of the 14th of April 1866, and the execution process, if any, issued thereon, should not be declared null and void, or set aside or stayed, and the proceedings, if any, towards execution, at Ahmedábád, should not be sent for and set aside or suspended, or why the defendant should not have liberty to appeal against the order of Sir Joseph Arnould of the 2nd of February 1869, &c.

About the end of March, counsel on behalf of the plaintiff commenced to show cause, before Sir Richard Couch, C.J.,

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and myself, against that order, and to support the summons granted on the 12th of February by Sir Charles Sargent; but it having been alleged that there was a treaty or agreement between the East India Company, or British Government, and the Chief of Pálitáná, we adjourned the case for the production of that Treaty. Eventually, Sir Richard Couch having been transferred to the High Court at Calcutta, cause was shown, on behalf of the plaintiff, against the rule *nisi* of the 8th of March, before my brother Melvill and myself, and at the same time, on behalf of the defendant, against the summons of the 12th of February. Neither party has produced any such Treaty or Agreement with the defendant or his ancestors, and we must ascertain from such other sources as are available to us the relation in which the defendant stands to the British government.

The order of the 1st of February 1869 by which Sir Joseph Arnould refused to set aside the decree, may perhaps be sufficient to prevent us from setting it aside, even although we may be of opinion that the High Court had not jurisdiction to entertain the suit, and we must recollect that, although we may disapprove of that order, we are not sitting as a Court of Appeal. The rule *nisi* granted by me, it is true, goes further than the rule *nisi* discharged by him, and contemplates other active measures besides setting aside the decree, such as declaring it null and void, or staying the execution of it, &c. Whether, if we cannot set the decree aside, we should be at liberty to declare it to be null and void, or to stay the execution of it, we do not think it incumbent upon us to give any opinion, because the order, which we shall make upon the summons sued out by the plaintiff from Sir Charles Sargent, will render it unnecessary for us so to do.

Although undoubtedly the ordinary rule is that a Court of Equity will assume its own decrees and orders to be correct and binding until duly reversed on rehearing, appeal, or review, and will carry them into execution; *Daly* v. *Daly* (*a*); *Clanmorris* v. *Clanmorris* (*b*); *In re St Sepulchre's Vicar*

(*a*) 2 Jo. & La. 752. (*b*) 14 Ir. Ch. Rep. 420.

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(*c*); yet where lapse of time or other circumstances render it necessary for the party seeking execution specially to invoke the aid of the court for that purpose, it has refused to carry out decrees and orders which manifestly appeared to be erroneous, and has declined, as Lord St. Leonards phrases it, to perpetuate error: *White* v. *Parnther* (*d*); *O'Connell* v. *Macnamara* (*e*); *Hamilton* v. *Houghton* (*f*); *West* v. *Skip* (*g*); *Roberts* v. *Hughes* (*h*); *Noble* v. *Stow* (*i*); *Moore* v. *Walter* (*j*); *Stamer* v. *Nesbitt* (*k*).

We think that there are equally strong reasons for a court's declining to carry into execution a decree or order which it had not any jurisdiction to make, and that this is the more especially so where the fact that would have shown to the court its want of jurisdiction in the particular case has been throughout the previous proceedings suppressed by the plaintiff.

The defendant, if originally privileged from suit in this court, has not in any wise waived that privilege by acquiescence in the jurisdiction of the court. Every step which he has taken has been in denial of that jurisdiction. He has, therefore, avoided the predicament in which the defendant in *Taylor* v. *Best* (*l*) placed himself, by acts which were held to amount to such an attornment to the jurisdiction as precluded him from applying to the court to stay proceedings, on the ground of privilege as an ambassador or foreign minister.

Was then the present defendant originally privileged from suit here? If he be an independent sovereign prince, it is, we think, clear that he was so privileged. Speaking of a sovereign prince, Lord Langdale, M. R., in *The Duke of Brunswick* v. *The King of Hanover*, said—"Remaining in his own dominions, or in the dominions of any other prince to whom he is not a subject, he would, as I presume, be

(*c*) 11 W. Rep. 456.
(*d*) 1 Knapp P. C. C. 179, 221, *per Lord Wynford.*
(*e*) 3 Dr. & War. 411.
(*f*) 2 Bligh O. S. 169.
(*g*) 1 Ves. Sen. 245, 246.
(*h*) Beat. R. 417; *et vide ibid.* 121.
(*i*) 5 Jur. N. S. 1115.
(*j*) 8 L. T., N. S., 448.
(*k*) 3 Jo. & La. 447.
(*l*) 14 C. B. 487.

exempt from all forensic jurisdiction" (6 Bevan, 56). Lord Langdale had previously said—"After giving to the subject the best consideration in my power,—it appearing to me that all the reasons upon which the immunities of ambassadors are founded do not apply to the case of sovereigns, but that there are reasons for the immunities of sovereign princes at least as strong, if not much stronger, than any which have been advanced for the immunities of ambassadors; that suits against sovereign princes of foreign countries must in all ordinary cases, in which orders or declarations of right may be made, end in requests for justice, which might be made without any suit at all; that even failure of justice, in some particular cases, would be less prejudicial than attempts to obtain it by violating immunities thought necessary to the independence of princes and nations,—I think that, on the whole, it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince resident in the dominions of another is exempt from the jurisdiction of the courts there" (*Ibid.* 50, 51). He then proceeded to show that a sovereign prince who was also a subject of the Crown of England, though exempt from all liability to be sued in the courts of justice in England for any acts done by him in his character of sovereign prince, would be liable to suit in those courts in respect of acts and transactions in which he may have been engaged as such subject of the Crown of England; and that in respect of acts done out of the realm of England, or any act as to which it may be doubtful whether it ought to be attributed to the character of sovereign or to the character of subject, it ought to be presumed to be attributable rather to the character of sovereign than to the character of subject.

That case, which was decided in 1844, has ever since been regarded as the leading authority on the subject of the immunity of sovereign princes from suit. The international doctrine there laid down is quite as applicable to the independent sovereign of a petty State as to the ruler of a great State, and has been, as we think, properly so applied by the Ṣadr Diváni Adálat N. W. P., in a suit against an

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independent Native Chief, which was dismissed for want of jurisdiction in the British Court: *Jivala Pershad and another* v. *H. H. the Rana of Dholepore* (*m*).

But it is said that there are various degrees of independence; that the defendant pays tribute to the British Government, owes allegiance to the British Crown, and, therefore, is liable to suit in the British courts of justice.

The Táluká or State of Pálitáná is situated in Gohelwár, one of the ten *pránts* or districts into which the province of Káṭṭiáváḍ is divided. Colonel LeGrand Jacob says—"The present name of Kattywar, for the peninsula, has without due reason been suffered to usurp its correct appellation, Sooráshtrá, by which it was known to the Greeks, and is still so to almost every native of Goozerat who can read and write." And again—"It is strange that the Káttys who are greatly inferior to the Rájput communities in numbers, territory, wealth, and rank, should have the honour of conferring their name on the peninsula; and it is to be regretted that its more appropriate and classical name of Sooráshtrá should not have been reverted to by its new governors, instead of its present incorrect designation, which has the further disadvantage of giving rise to mistakes whenever its subordinate province (*pránt*) of Kattywar is alone referred to:" Bombay Government Records, Printed Selections, N. S., No. XXXVII., p. 6; and see 3 Grant Duff's Hist. Mahrattas, p. 260 (Bombay reprint, 1863), where it is further observed that "the whole region is inhabited by a warlike people, chiefly Járejá Rájpoots, who are under separate chiefs." The inhabitants of the *pránt* Gohelvar have been always noted for their steady, and often successful, resistance of Maráṭhá violence: Bombay Government Records, Printed Selections, No. XXXVII., N. S., pp. 287, 288.

It is true that the British Government receives tribute from the Thákur of Pálitáná,—not so, however, for itself, but for the Gáikváḍ of Barodá and the Nawáb of Júnágaḍ; the proportions, settled by the British Resident, Colonel Walker,

(*m*) S. D. Rep. N. W. P. for 1863, Pt. I., 579.

A.D. 1807-8, being, when reduced into our currency, Rs. 7,874 to the Gáikvád, and Rs. 2,490 (Zurtulubi) to the Nawáb. *See* Aitchison's Treaties, Vol. 7, Appx. No. IX. (Colonel Keatinge's Report of 27th July 1864), p. lxvi., which also shows that the State of Pálitáná has one "independent tribute-payer" (viz., the Thákur), "contains one hundred villages, yields a gross annual revenue of two lákhs of rupees, and that the Thákur enjoys second class jurisdiction." *See* also Bombay Government Records, No. XXXVII., N. S., pp. 74, 75, 107, 135. The rule of primogeniture prevails as to this principality, partition not being allowed (*Ibid.*, 250, 251), a prohibition indicative, though not conclusively so, of a *Ráj*: 7 Moo. Ind. App. 476; 5 *Ibid.*, 169; 6 *Ibid.*, 164; 1 Bom. H. C. Rep., 2nd ed., App., pp. xlii.—xlvii.; 1 Strange, H. L., 235, 236.

The tribute, as originally collected by the Gáikvád in Káṭṭiávád was very much in the nature of black-mail, and was levied by an annual raid or foray of what was styled a *mulkgiri* army. The history of the substitution for it in 1807-8 of the present pacific system, by which the tribute is collected by the British Government in Káṭṭiavád on behalf of the Gáikvád and the Nawáb of Junágáḍ, is to be found in Vol. VI. of Aitchison's Treaties, pp. 361—366, 370, 371, 399, and 400. The chiefs of Kaṭṭiávaḍ then also entered into engagements with sureties, providing for the general peace of the country. (*Ibid*, 364.) Specimens of these engagements with the State of Limḍi are given at pp. 500—503 of the Bombay Government Records, No. XXXVII. N. S., and at p. 503 it is stated that similar engagements were at the same time concluded with various other tálukás which are named, and (p. 505) include Pálitáná. Whether those engagements were precisely the same does not appear. "But," continues Mr. Aitchison, "it was soon discovered that the Kattywar chiefs, partly from their pecuniary embarrassments and partly from their weakness and the subdivision of their jurisdictions, were incapable of acting up to the engagements which bound them to preserve the peace of the country and suppress crime. On the other hand, the British government was fettered in

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its efforts to effect an improvement in the administration by these very engagements, which it had mediated when the country was under the authority of the Peishwá and the Gáikvád, and when the substitution of the direct control of the British supremacy for that of the Native governments had not been contemplated. *These engagements, besides considerations of financial and political expediency, prevented the subjection of the chiefs to ordinary British rule,* and no course of reform was left open save to introduce *a special authority* suited to the obligations of the British government, the actual condition of the country, and the usage and character of its inhabitants. Inquiries which had been instituted in 1825 showed that the Kattywar chiefs believed the sovereignty of the country to reside in the power to whom they paid tribute; that before the British government assumed the supreme authority, the Gáikvád had the right of interfering to settle disputed successions, to punish offenders seized in chiefships of which they were not subjects, to seize and punish indiscriminate plunderers, to coerce chiefs who disturbed the general peace, and to interfere in cases of flagrant abuse of power or notorious disorder in the internal government of the chiefs. Based, therefore, upon these rights of the supreme power, the British government in 1831 established a criminal court of justice in Kattywar, to be presided over by the Political Agent, aided by three or four chiefs as assessors, for the trial of capital crimes in the states of chiefs who were too weak to punish such offences, and of crimes committed by petty chiefs upon one another, or otherwise than in the legitimate exercise of authority over their own dependants. Until the year 1853 every sentence passed by this court was submitted to the Bombay Government for approval; but now sentences not exceeding imprisonment for seven years do not require the sanction of superior authority. There are five chiefs in Kattywar, viz., Joonaghur, Nowanuggur, Bhownuggur, Poorbunder, and Drángdrá, who exercise first-class jurisdiction, that is to say, have power to try for capital offences, without permission from the Political Agent, any persons except British subjects; and eight, viz., Wankaneer, Morvee, Rájkot, Gondal, Dherel, Limdi, Wudwán, and *Pálitáná,* who exercise second-

class jurisdiction—that is to say, have power to try for capital offences, without permission of the Political Agent, their own subjects only:" Aitchison's Treaties, Vol. VI., pp. 366, 367. A somewhat different definition of second-class jurisdiction is given in Captain Barr's Report of 31st August 1854, Bombay Government Records, No. XXXVII., N. S., p. 136, where, as to the Thákur of Pálitáná, it is said—"The Chief has jurisdiction of crimes committed within his own territories by his own subjects; but he has not the power of life and death." Taking this to be so, and that to a certain extent the criminal jurisdiction of the Thákur of Pálitáná has been circumscribed; and that the Gáikvád heretofore exercised, and the British government now exercise, a superintending and controlling power over him and the other chiefs of Káṭṭiávád, far more substantial than that of the Emperor of Delhi over Calcutta A.D. 1800, when Lord Stowell, in his judgment in *The Indian Chief* (*n*), described the latter as the empyrean sovereignty of the Moghal, occasionally brought from the clouds for purposes of policy, but which hardly existed otherwise than as a phantom; yet the authorities to which we have referred with respect to the political status of the chiefs of Káṭṭiávád show that the Thákur of Pálitáná is no ordinary subject, is a prince, and has subjects of his own, is styled by British political officers an independent tribute-payer, and that certain international arrangements have been entered into between the chiefs of Káṭṭiávád and the British Government, and do not afford a trace of any civil jurisdiction having been exercised over the Thákur of Pálitáná or the other chiefs of Káṭṭiávád by the Gáikvád formerly, or by our courts since the British Government became the controlling power. Those governments may have interfered politically in cases of disputed succession to the principalities of Káṭṭiávád, but that is very different from an exercise of ordinary civil jurisdiction. The learned counsel for the plaintiff, indeed, admitted that he was unable to mention any instance of our courts having assumed civil jurisdiction over any chief of

(*n*) 3 C. Rob. 31.

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Káttiávád. Were there, however, any doubt as to the nature of the relations subsisting between those chiefs and Her Majesty's Government, it has been put an end to by the State paper which I shall now read, and which was not—nor, so far as we know, were the authorities relating to Káṭṭiávád already mentioned—brought to the attention of Sir Joseph Arnould. That document is an official extract (paras. 1 to 5) from a despatch from Her Majesty's Secretary of State for India to His Excellency the Right Honourable the Governor General of India in Council, dated 31st August 1864, No. 54, Political:—

"'1. I have taken into consideration in Council the important question submitted to Her Majesty's Government in the letter of your Excellency's Government No. 70, of 14th April 1864, respecting the political position of Kattyawar.

"'2. I have read with interest and attention all the arguments which have been adduced on either side by the several members of the Governments of India and of Bombay. It is not necessary that I should examine in detail these conflicting arguments, or record an opinion with respect to their relative weight. It is sufficient to say that the Chiefs of Kattyawar have received formal assurance from the British Government that their rights will be respected, and that the Home Government of India, so lately as 1858, repudiated the opinion that the province of Kattyawar was British territory, or its inhabitants British subjects.

"'3. At the same time, there is no doubt that the British Government have for a lengthened period exercised powers which are unquestionably of a sovereign character, with the full recognition and acquiescence of the chiefs and people, and have interfered at all times, when occasion required, for the preservation of peace and maintenance of order.

"'4. But we have never exercised the right to apply our civil and criminal codes of procedure to Kattyawar, and whatever reforms we have introduced have been made in such a manner as to ensure the coöperation and support of the chiefs. It has been our aim not to undermine their authority

and independence, nor to undertake the internal administration of the province.

"'5. Her Majesty's Government have no desire to claim any more direct and formal sovereignty than has thus been exercised ever since our first connection with Kattyawar, nor to impose British laws and regulations on the chiefs of the province.'

"(True extract, given to Pálitáná Vakíl).

"(Signed) S. C. LAW,

"Acting Political Agent.

"*Rajkote, 17th June* 1870."

For these reasons, and although the causes of action in this suit may have accrued in the island of Bombay, we are satisfied that this court had not any jurisdiction to entertain this suit against the Thákur of Pálitáná. We shall not interfere with Sir Joseph Arnould's order, whereby he declined to set aside the decree, and we, therefore, stay no rule upon the motion of the defendant to make absolute the order *nisi* of the 8th of March 1870, which contemplated that the decree and other proceedings should be set aside or declared null and void, &c.; but, on the other hand, we dismiss the Judge's summons, obtained by the plaintiff in chambers, calling upon the defendant to show cause why the decree should not be executed against him, and we allow the cause shown by the defendant. This order, though not in form a stay of execution, will no, doubt, operate as a permanent order to that effect. Looking on the one side at the suppression of the defendant's rank by the plaintiff, and on the other at the defendant's delay in impeaching the decree, and at the apparent absence of merits on his part so far as regards the causes of action, we must say no costs of these proceedings to either party.

Attorney for the plaintiff: *Shámráv Pánḍurang.*

Attorneys for the defendant: *Rimington, Hore, and Langley.*

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Suits Nos. 410 *and* 411 *of* 1868.

HARIVALLABHDA'S KALLIA'NDA'S.....*Plaintiff.*
UTAMCHAND MA'NIKCHAND *et al.* .....*Defendants.*

Contempt of Court—Attachment—Service of Rule nisi *for Attachment in Foreign territories—Delay—Foreign Territories—Special Bailiff—Imprisonment—Criminal Side of Jail.*

On the 17th of December 1869 a rule *nisi* for the attachment, for contempt of court, of the defendants U., G., & T. was granted. The rule, owing to one of the defendants keeping out of the way, was not drawn up and served until the month of April following, when it was served upon the defendants in the territories of the Gáikvád of Barodá, the consent of the Gáikvád's Minister to serve the notice having been previously obtained.

On motion to make the rule absolute, it was held that the rule was served in time, and that the service of it in the Gáikvád's territories, with the consent of the Gáikvád, was valid service.

Whether the service would have been valid if such consent had not been obtained, *quære?*

The High Court will not send a special bailiff into the Gáikvád's territories to arrest a defendant who has been guilty of a contempt of court, but the court will send a special bailiff for such purpose beyond the local limits of the High Court to a place within the Presidency of Bombay.

A defendant guilty of contempt of court is liable to imprisonment on the criminal side of the Bombay Jail.

FOR the purpose of this report the facts in the above suits may be very briefly stated.

Harivallabhdás Kalliándás was the plaintiff in both suits.

In Suit No. 410 of 1868 the defendants were Utamchand Máṇikchand, Ghellábhái Hemchand, Baichand Vardmán, Amirchand Máṇikchand, and Tulsidás Kisandás.

The defendants in Suit No. 411 of 1868 were the same as in the former suit, with the exception of Tulsidás Kisandás, who was not a party to the second suit.

The plaintiff had entered into two separate partnerships, one with the five defendants in the first suit, the other with the four defendants in the second suit.

Both partnerships were formed with the same intention and for the same purpose, namely, that of purchasing diamonds, jewels, &c., and then selling them to the Gáikvád of

Baroḍá, who at the time the partnerships were entered into was expected to purchase such articles on an extensive scale. The present suits were brought by the plaintiff to get an account from the defendants of the partnership dealings and transactions. The plaintiff alleged that a considerable quantity of diamonds and jewels had been sold by the defendants (who were influential men at the court of the Gáikvád) to the Gaikvád on account of the partnerships for which the defendants had not accounted, and that a considerable quantity of diamonds and jewels also remained in the hands of the defendants unsold. He prayed that a receiver might be appointed in both suits to get in the outstandings of the partnerships, and to receive and sell the unsold diamonds, jewels, &c.

The defendants in their written statements denied that the plaintiff was their partner in the above transactions, and said that one Kalliándás Kirpárám, the father of the plaintiff, was their real partner. They also denied that they had in their possession any diamonds or jewels belonging to the partnership, with the exception of a few jewels of trifling value.

On the 5th of September 1868, WESTROPP, J., made absolute a rule *nisi* which he had granted for the appointment of a receiver in both suits. This rule was served upon Tulsidás Kisandás personally on the 26th of September 1868; on the defendants Utamchand and Hemchand on the 9th of October 1868, through their solicitors, Messrs. Rimington, Hore, and Langley, and upon the same day on the other defendants, Bháichand and Amirchand, through their solicitors, Messrs. C. E. and F. Stanger Leathes. Mr. Joseph Jefferson was by the order appointed receiver in both suits.

On the 1st of February 1869, WESTROPP, J., made absolute an order for the attachment of the defendant Utamchand, for not making over to the receiver "all the property forming part of the subject-matter of the above suits, and in the plaints in those suits mentioned, or either of them, which was in the hands, custody, possession, or power of the defendant Utamchand, or of his servants or agents."

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On the 14th of May 1869 Mr. Frank George Jefferson was appointed receiver, instead of his father, Mr. Joseph Jefferson, during the absence of the latter from Bombay, and the appointment was duly notified to all the defendants.

Both causes came on for hearing before COUCH, C.J., and on the 15th October 1869 decrees were made in both suits declaring the plaintiff to have been the partner in both partnerships, ordering the accounts of the partnerships to be taken, and directing that the order for a receiver in both suits should be continued.

On the 17th of December 1869, COUCH, C. J., granted a rule *nisi* for an attachment against all the defendants, except Bháichand Vardmán, for contempt in not obeying the order of the 5th of September 1868.

This rule was, on the 7th of April 1870, served upon the defendant Utamchand with the Gáikváḍ's consent in the territories of that prince. On the same day the rule was served on the defendants Ghellábhái and Amirchand, also in the Gáikváḍ's territories, the consent of the Resident at Barodá and of the Chief Minister of the Gáikváḍ having been first obtained. The rule was also served upon Tulsidás in Barodá on the 26th May 1870.

On the 20th day of June 1870, *Atkinson*, Serjeant, moved for a rule *nisi* calling upon the plaintiff to show cause why the service of the rule of the 17th September 1869 on the defendants Utamchand and Ghellábhái should not be set aside. The grounds on which he moved are stated in the judgment of the court. That motion was heard before WESTROPP, C.J., and MELVILL, J., together with the motion of the plaintiff to make absolute the rule *nisi* for attachment for contempt.

Anstey for the plaintiff.

Atkinson, Serjeant (with him *Macpherson*), for the defendants Utamchand and Ghellábhái.

Mayhew for the defendant Amirchand.

Cur. adv. vult.

Dec. 22nd, 1870. WESTROPP, C.J. (after stating the facts of the case, and pointing out that no cause had been shown

on the merits against the issuing of an attachment against the defendants for contempt, proceeded) :—

Mr. Serjeant Atkinson, on behalf of the defendants Utamchand Máṇikchand and Ghellábhái Hemchand, moved for a rule *nisi* calling on the plaintiff to show cause why the rule *nisi* of the 17th December 1869 should not be set aside: 1*st*, because it was drawn up and served too late; and 2*ndly*, because the service was effected in a foreign territory, that of the Gáikvád at Barodá. On the first point the learned counsel cited *Kenney* v. *Hutchinson* (*a*), a Common Law case quite dissimilar in its circumstances to the present case, and, therefore, inapplicable. It is not pretended that any injury whatever has accrued to the defendants by the delay which occurred in drawing up the rule *nisi*, or that since that rule *nisi* was granted, on the 17th of December 1869, they have taken one single step towards compliance with the order of the Court, made on the 5th of September 1868, appointing the receiver, and directing the defendants to make over to him the jewels &c. the property of the partnership. The delay which has occurred since the drawing up of rule *nisi* has been chiefly occasioned by the persistent evasion of the service of that rule by the defendant Tulsidás Kisandás, as well while he was resident in Bombay as afterwards in Barodá, where the sheriff's bailiff eventually succeeded in serving him on the 26th of May last at 3 o'clock in the morning. The conduct of the defendants has been so fraudulent and contumacious as to disentitle them to any consideration whatever. We think that the first ground (delay) on which the learned Serjeant rested his motion completely fails.

On his second objection, namely, that the service of the rule *nisi* having been made in a foreign country is invalid, we think that the learned Serjeant must be equally unsuccessful. The defendants have never denied or disputed the jurisdiction of this court to entertain these suits, or that the causes of action accrued within that jurisdiction. They have appeared in them by attorney and counsel. Decrees have been pro-

(*a*) 6 M. & W. 134.

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nounced against them. The rule *nisi* has been required by the court to be served upon them *personally*, to satisfy its conscience that they certainly have notice of the application against them. That application is for an attachment for contempt of the order of the court, but the court does not propose, nor is it asked by the plaintiff, to direct the execution of that attachment in the Gáikvád's territory; whether His Highness the Gáikvád may, or may not, himself or by his ministers, authorize or direct its execution in his territories, or whether this court would uphold such execution, if so permitted or directed by that sovereign, there is not any present necessity to consider. We are now only concerned with the validity of the service of the rule *nisi* for that attachment, which operates as a notice to the defendants personally that an application for an attachment has been made, and was intended to give them an opportunity of coming in to oppose it, and to show, if they can, that they have not committed any breach of the order of the 5th of September 1868, which has been continued by the decrees of Sir Richard Couch on the 15th of October 1869. This case, therefore, is not on all fours with the case of *Cassim Azim Dooplay* v. *Cassim Mahomed Barroocha* (*b*), cited for the defendants, in which Peacock, C. J., and his colleagues gave it as their opinion that a special bailiff cannot be sent to serve in a foreign territory the summons initiating an action. Putting out of view for the moment the permission here accorded by the foreign sovereign, this case more nearly resembles *Stockport* v. *Hawkins* (*c*), in which the defendant resided at Boulogne, in France, to avoid his creditors in England, and a notice in a suit in England served on him at Boulogne that a writ of *scire facias* to revive a judgment had been lodged with the Sheriff was held to be a well-served notice. But whatever objection there might have been to the service of the rule *nisi* in this case has been completely removed by the fact that His Highness the late Gáikvád, through his chief minister of state, granted his permission that the rule *nisi* might be served upon the defendants in

(*b*) 10 Cal. W. Rep., Civ. R. 349. (*c*) 7 Jur. 1015.

Barodá. If the sovereign of a foreign territory previously assents to and authorises such a proceeding as has taken place here, there cannot be said to have been any violation of territory. It cannot be maintained that he, an absolute sovereign, had not power to waive any objection which there may have been to the service of this rule *nisi*. It is very much to the credit of His Highness to have shown such comity towards one of the courts of Her Britannic Majesty, and the more especially high-minded on his part as showing his indisposition to screen one of the principal defendants, Utamchand Máṇikchand (who then was or lately had been one of His Highness's own servants), from the consequences of that servant's dishonest and fraudulent conduct. For these reasons we have no doubt that the learned Serjeant's motion should be refused with costs, and it is so refused, accordingly.

The learned Serjeant, on behalf of the same defendants, Utamchand and Ghellábhái, next asked *ore tenus* for a commission to Barodá to examine those defendants and some other witnesses, under Sec. 177 of the Civil Procedure Code, for the purpose of obtaining evidence in opposition to the plaintiff's motion that the rule *nisi* should be made absolute. Both of those defendants were served with the rule *nisi* of the 17th of December 1869 on the 7th of April 1870, and the motion to make it absolute did not come on until the 20th of June. If they had any sound and honest reasons to offer against the issuing of the attachment, they had an abundance of time and opportunity to do so. Upon a timely application the Resident or some other gentleman at Barodá would have been authorised to take the affirmation of the defendant Utamchand Máṇikchand to any affidavit which he might have deemed it proper to make in support of his defence, if any. There were not any attachments out against the defendants Ghellábhái and Tulsidás, and there was, therefore, not any reason why they should not have come here to make affidavits. But if they had asked in proper time I am not prepared to say that I should not have permitted them to make affidavits at Barodá before the Resident. The application, however,

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on behalf of the defendants Utamchand and Ghellábhái was deferred until the 20th of June on the return of the rule *nisi*; and we are perfectly certain that it was so deferred, and has been made for the sole purpose of further delay and evasion in complying with the order of the court, in pursuance of the same fraudulent and contumacious policy which has marked their conduct throughout these suits, and that they have not any *bonâ fide* defence whatever.

The court accordingly made an order that an attachment should forthwith issue against the defendants Utamchand, Ghellábhái, and Tulsidás,* and that they should pay the costs of the motion and of the attachment, but intimated that in making the order it did not direct its execution beyond British territory.

On a subsequent day (the 27th of January 1871) *Anstey*, on behalf of the plaintiff, moved for leave to send a special bailiff to the railway station at Barodá (which is in British territory) to take into custody the persons of the defendants Utamchand, Ghellábhái, and Tulsidás, stating that the Gáikvád was willing to hand over these persons to British jurisdiction. He cited Rule 55 of the Rules of the late Supreme Court.

WESTROPP, C. J.:—The railway station at Barodá being in British territory annexed to and forming part of the Presidency of Bombay (*a*), I see no objection to the Sheriff sending a special bailiff or bailiffs if necessary to Barodá station to take these persons into custody. The special bailiff must be cautious not to act as such outside British territory. I only authorise him to take these persons into custody if he find them within British territory forming part of this Presidency; I make no direction as to how they are to be brought to the Barodá station. That is a matter which rests with the Gáikvád, whose conduct, I may add, throughout these proceedings has been highly creditable to him. With

* By consent the rule *nisi* for attachment so far as it related to the defendant Amirchand was not made absolute.

(*a*) Bombay Act I. of 1862.

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respect to Rule 55 of the Supreme Court Rules (which, under Rule I. of Chap. II. of the High Court Rules, is, to the extent permitted by that rule, applicable at the original side of the High Court), it may be useful to say that it (Rule 55), so far as it treats Salsette and Karanjá as within the *ordinary* limits within which the Sheriff should execute process, has, I believe, for a long time past been obsolete. Colaba (not Angria's Colaba), Old Woman's and Butcher's Islands, which are also mentioned in that rule, are appurtenances of the Island of Bombay, but Salsette, Elephanta, Hog Island, and Karanjá form part of the Mofussil of the Presidency of Bombay. Butcher's Island is a corruption of Putachoes Island, which Dr. Fryer (Letter II., Chap. III., p. 76, of his Travels) describes as "a garden of melons (Putacho being a melon)," and was taken by Sir Gervase Lucas in 1666-67 from the Portuguese by force (Fryer, ibid. p. 64). Bombay Reg. III. of 1799 illustrates the fact that Old Woman's, Colaba, Cross (*alias* Gibbet Island), and Butcher's Islands were immediate dependencies of Bombay, and that Salsette, Karanjá, Elephanta, and Hog Islands belonged to the Mofussil. By that Regulation, the Civil Judge for Salsette, Karanjá, Elephanta, and Hog Islands was (sec. 2) created Revenue Judge for the Island of Bombay. Sec. 7 gave him cognizance of suits relating to revenue due to the East India Company "from the Island of Bombay or the adjacent dependencies of Old Woman's, Colaba, Cross, and Butcher's Islands," but he had not any other jurisdiction over them, for they, as immediate dependencies of Bombay, were civilly and criminally under the Recorder's and Supreme Courts, which were prohibited from entertaining suits relating to the revenue under the management of the Governor in Council. This prohibition rendered the appointment of a Revenue Judge, specially for the last five islands, necessary. "The islands of Salsette and Caranja and their dependencies,"—by which latter expression I understand Elephanta and Hog Islands to be intended,—are mentioned in Bombay Regulation II. of 1827, Appendix E, as part of the Zillá of the Northern Konkan, *i.e.*, now the Zillá of Thánáá.

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The defendants were on a subsequent day brought to Bombay, and, by order of the court, were lodged in jail on the criminal side.

Attorneys for the plaintiff: *Acland, Prentis, and Bishop.*

Attorneys for the defendants Utamchand and Ghellabhái: *Rimington, Hore, and Langley*; Amirchand: *Leathes and Crawford.*

Referred Case.

Dec. 15.

DOSA'BHA'I KA'VASJI .....*Plaintiff.*
KHERBA'DJI HORMASJI .....*Defendant.*

Small Cause Court—Reference of Case—Act XXVI. of 1864, *Secs.* 7 *and* 8—*Promissory Note—Stamp—Penalty on Unstamped Promissory Note —Act XVIII. of* 1869, *Sec.* 28.

The Judge of a Small Cause Court, before referring a case for the opinion of the High Court under Secs. 7 and 8 of Act XXVI. of 1864, ought to *conclude* the hearing of the case, and to give judgment thereon contingent upon the opinion of the High Court.

Under Sec. 28 of Act XVIII. of 1869, a Court has no power to admit in evidence an unstamped promissory note (payable on demand or otherwise) upon the payment of the stamp duty, and the penalty laid down in Sec. 20 of that Act.

CASE stated for the opinion of the High Court by John O'Leary, First Judge of the Bombay Court of Small Causes, under Sec. 7 of Act XXVI. of 1864:—

"In the course of the hearing of the above case, which came on before me on the 28th day of July 1870, Mr. Morobá Kánobá, as Pleader for the defendant, tendered in evidence a Gujaráti document. It bore an adhesive stamp value one anna, and no other stamp. It was proposed to be made use of as a promissory note; and I was of opinion that it was a promissory note within Cl. 25 of Sec. III. of the General Stamp Act, 1869, and that, being payable 'otherwise than on demand,' it required a stamp of twelve annas, under Cl. 2, Sch. I. of the said Act.

"Mr. Morobá tendered the amount of stamp duty and penalty under Sec. 20 of the said Act; I was satisfied that the omission 'did not arise out of any intention to evade payment of the proper duty,' but was of opinion that, under Sec. 28 of the Stamp Act, I was not at liberty to receive the amount of the stamp and penalty tendered.

"Mr. Morobá contended that Sec. 28 was confined in its operation to 'instruments chargeable with the duty of one anna.' I, on the other hand, was of opinion that the section applied to all promissory notes, as well as to all instruments chargeable with a duty of one anna, and refused to receive the document without the proper stamp, or to take the amount tendered, together with the penalty.

"Thereupon Mr. Morobá required me to state a case for the opinion of the High Court on the point of the admissibility of the document on payment of the penalty.

"The amount sued for in this action being over Rs. 500, I conceive I was bound to state the case, as required under Sec. 7 of Act XXVI. of 1864; but I have since felt some doubt whether, on the construction of Secs. 7 and 8 of the latter Act, taken together, I ought not to have gone on with the case to decree, and then have pronounced a judgment on the case itself, contingent on the opinion of the High Court on the stamp point. What I did was:—I adjourned the hearing of the case until further order, and gave judgment on the question under the Stamp Act contingent on the opinion of the High Court.

"I rejected the document on the ground that it required a stamp of more than one anna, and that I had no power to receive the amount and penalty, and I gave the above judgment contingent on the opinion of the High Court, which is hereby solicited on the points—

1. Whether the course I adopted was regular?
2. Did the document in question require a stamp?
3. Was it sufficiently stamped?
4. Had I power to receive the amount of stamp duty and penalty tendered?"

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The instrument referred to in the case was as follows :—

"To Pársi Dosábhái Kávasji, Contractor, written by Pársi Kherbádji Hormasji, Contractor. To wit. You have agreed to deliver to me 4,000, namely, four thousand, *barás* of earth, a writing in respect of which is made on the 9th day of March 1870; and as to Rs. 2,000, namely, two thousand, which have been agreed to be paid in terms of that writing, on account thereof Rs. 1,001, namely, one thousand and one, have been paid to you, and I am duly to pay the balance of Rs. 999, namely, nine hundred and ninety-nine, in the time of eight days from this day. The 9th day of March of the year 1870.

(On an adhesive one-anna stamp.)

"Pársi Kherbádji Hormasji his signature, the handwriting of Barjorji Kherbádji.

(On the back.)

"The 23rd day of March 1870 Rs. 500 (namely), five hundred, have been paid on account of this receipt by the hand of Dádu Miyá."

The case came on for consideration, on the 15th of December 1870, before WESTROPP, C.J., and BAYLEY, J. There was no appearance on either side.

PER CURIAM :—We answer the first question of the learned Chief Judge of the Court of Small Causes (namely, whether the course he adopted in giving judgment as to the sufficiency of the one-anna stamp upon the document of the 9th of March 1870, and as to his inability to admit it in evidence on payment of the stamp duty and penalty, and adjourning the cause without giving judgment upon it generally, was regular) in the negative. We think that Secs. 7 and 8 of Act XXVI. of 1864, show that before referring any question in the cause to the High Court, he should have given judgment generally in the cause.

The second question—whether the document in question required a stamp—we answer in the affirmative.

The third question—whether it was sufficiently stamped—we answer in the negative. It only bore a one-anna stamp.

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whereas it should have borne a twelve-annas stamp, as being a promissory note for a sum exceeding Rs. 900 and under Rs. 1,200 payable otherwise than on demand.

The fourth question—whether the learned Chief Judge of the Court of Small Causes had power to receive the amount of the stamp duty and penalty tendered—we answer in the negative. Sec. 28 of Act XVIII. of 1869, in our opinion, clearly prohibits the reception in evidence under Sec. 20 of that Act of a promissory note, such as the present, not bearing the stamp required by law.

We have, in order to save time and possible further expense to the parties, answered these questions, although the case has been somewhat irregularly referred to this court, as indeed the learned Chief Judge himself seems to have thought. We now remit the cause to the Court of Small Causes to be disposed of in conformity with our answers to the second, third, and fourth questions; and, under the circumstances under which this case has been referred to us, we must also leave to that court the disposal of the costs of this reference.

Suit No. 561 *of* 1870.

Dec. 22.

NARSINGDA'S MULTA'NCHAND .....*Plaintiff.*
NAHA'NUBA'I, widow of Baldev Taklá, and another .....*Defendants.*

Suit No. 645 *of* 1870.

SUMA'RMAL JOHA'RIMAL .....*Plaintiff.*
NAHA'NUBA'I, widow of Baldev Taklá and another .....*Defendants.*

Practice—Service of Writ of Attachment—Execution—Priority.

In considering which of two writs of attachment in execution of a decree is to have priority over the other, the time when the writs are lodged in the office of the Sheriff is the criterion by which priority is to be determined, and not the time when such writs reach the hands of that officer.

THESE were two suits brought against the widow and son of Baldev Taklá, deceased, as his legal representatives.

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Judgment was given for the respective plaintiffs on the same day (the 29th of November 1870).

The decree in Suit No. 645 of 1870 was issued to the attorney of the plaintiff from the office of the Prothonotary, about an hour and a half before the decree in Suit No. 561 of 1870 was issued to the plaintiff's attorney in that suit; and subsequently writs for the attachment of certain moneys, in the hands of the Prothonotary and of the Sheriff respectively, belonging to the estate of Baldev Taklá, were also issued from the Prothonotary's office, in the same order of time, to the respective attorneys of the plaintiffs.

The writs in Suit No. 645 of 1870 were, on being so issued, lodged, in the usual course, in the offices of the Sheriff and Coroner respectively, that in the office of the Sheriff for service on the Prothonotary, that in the office of the Coroner for service on the Sheriff. These writs were served in due course.

The writs of attachment in Suit No. 561 of 1870 were, subsequently in point of time to the lodging of the writs in Suit No. 645, handed for service to the Sheriff and Coroner's bailiff respectively in person, these officers being at the time absent from their offices; and these latter writs were in consequence actually executed a few minutes earlier than the writs in Suit No. 645 of 1870, without being lodged in the first instance in, or having passed through, the respective offices of the Sheriff and Coroner.

Upon affidavits setting out the above facts, a summons was granted, on the 8th of December 1870, calling upon the plaintiff in Suit No. 561 of 1870 to show cause why the plaintiff in Suit No. 645 of 1870 should not have priority in recovering the sums of Rs. 2,250 and Rs. 2,624 attached in the hands of the Prothonotary and Sheriff respectively.

Cause was shown before BAYLEY, J., in chambers on the 19th of December 1870.

McCulloch contended that the plaintiff whose writ was first served was entitled to priority.

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The Honorable A. R. Scoble (Acting Advocate General), in support of the summons, contended that, as the usual course was to lodge writs of attachment in the office of the Sheriff for execution, the plaintiff who first so lodged his writ was entitled to priority, and the Sheriff and Coroner by changing the order of execution could not alter the legal rights of the parties. He cited Archbold, Queen's Bench Practice, Vol. I., ch. XXVI., para. 12, p. 545 (8th ed.).

22nd Dec. BAYLEY, J. (after taking time to consider) directed the summons of the 8th of December to be made absolute with costs, and said that, as the offices of the Sheriff and Coroner respectively were the proper places for the delivery of writs of attachment for execution, the plaintiff who first lodged his writs in these offices was entitled to priority.

Summons made absolute.

Attorneys for the plaintiff in Suit No. 561: *Hearn, Cleveland, and Peile.*

Attorney for the plaintiff in Suit No. 645: *Khanderáv Moroji.*

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Oct. 8.

Appeal Suit No. 161.

THE HONGKONG AND SHANGHAI BANKING CORPORATION... (*Plaintiffs*)—*Appellants.*

T. BAKER .....(*Defendant*)—*Respondent.*

Carrier by Sea—Delivery of Goods carried—Landing Goods on Bandar—Custom of Port of Bombay—Bill of Lading—Protection afforded by clause exempting from Loss by Fire—Customs Act (VI. of 1863), *Secs.* 51, 52, 53, *and* 54.

Neither by the custom of the port of Bombay, nor by the provisions of the Customs Act, is the master of a ship bound to wait fifteen days before commencing to land his cargo; but within a reasonable time after the arrival of his ship—forty-eight hours in the case of a sailing vessel, and somewhat less in the case of a steamer—he is at liberty, if the consignee has not then sent boats for them, to land the goods at the Custom House Bandar or other place sanctioned by the Customs authorities; and such landing is not unlawful, or a breach of contract as carrier, on the part of the master.

The landing of goods under the above circumstances, and setting them apart on the Custom House Bandar for the consignee, do not constitute a delivery of them to the consignee; but such goods, after being so landed, continue in the possession of the master as carrier.

Course of legislation with reference to the landing of goods on the Custom House Bandar reviewed.

Whether, (under the special circumstances of this case stated in the text,) the goods when so landed remained in the custody of the master in his capacity of common carrier or as a warehouseman? *quære.*

The master of a vessel who receives goods on board under a bill of lading which exempts him from liability from loss occasioned by the act of God, the Queen's enemies, *fire*, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature or kind, and lawfully lands the goods at the port of discharge, is, so long as the goods remain in his custody after being so landed, protected from liability from loss by fire under the above exemption in his bill of lading.

THIS was an appeal from the judgment of COUCH, C.J., delivered on the 7th of August 1869. The report of the case in the Division Court will be found in the 6th volume of the Bombay High Court Reports, O. C. J., p. 71. The facts are there, and in the judgment of the court of appeal, fully set out.

The appeal was argued before WESTROPP and SARGENT, JJ., in December 1869, when the arguments extended over five days.

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Scoble (Acting Advocate General) and *McCulloch* for the appellants.

Green and *Latham* for the respondent.

The questions raised were the same as those raised in the Division Court.

The arguments and cases cited are so fully stated in the judgment of the Court that it is unnecessary to set them out here.

Cur. adv. vult.

WESTROPP, C.J. :—This is an appeal, heard by Sir Charles Sargent and myself, from a decree made by our late Chief Justice, Sir Richard Couch, upon the 7th of August 1869. Somjibhái Visrám, who carries on business both at Hongkong and Bombay, shipped at the former place goods, consisting of sugar-candy, sugar, Panjam silk, and cassia, on board the "American," a steamer of about 1830 tons register, for Bombay. By the bills of lading (five in number) signed by the defendant, who was master of the "American," the goods were to be delivered at the port of Bombay, "(the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever excepted,) unto order or its assigns," the freight &c. being made payable in Hongkong. Eighty-eight of the bills of lading signed by the master expressly provided that he should be at liberty to land the goods immediately on arrival. Twenty-nine of the bills of lading did not contain any such proviso. The five bills of lading with which we are concerned in the present case, were amongst those twenty-nine. These five bills of lading were indorsed in blank by Somjibhái Visrám and delivered to the plaintiffs, who had advanced money to Somjibhái Visrám in Hongkong on a bill of exchange for Rupees 35,000, drawn, against the above-mentioned shipment, by him on his firm in Bombay, and payable fifteen days after sight.

The "American" arrived in the port of Bombay on the 17th of February. She was consigned by the charterers to their agents, Messrs. Remington & Co., at Bombay.

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Messrs. B. & A. Hormasji were the agents of the plaintiffs at Bombay, and received and held on their behalf the five bills of lading and bill of exchange, which latter was presented by them to, and accepted by, the firm of Somjibhái Visrám at Bombay on the 15th of February 1869. It, consequently, was not due until the 5th of March. In the *Times of India* of the 18th February there appeared the following advertisement :—

"NOTICE.—Consignees of cargo per steamer 'American,' Baker commander, from Hongkong and Singapore, are requested to present their bills of lading at the office of the undersigned, and take delivery of their goods as landed."

"REMINGTON & Co.,
"Agents S. S. 'American.'

"*Bombay, 17th February* 1869."

Nasarvánji Ardesar Hormasji, one of the firm of B. & A. Hormasji (plaintiff's agents) admits that he saw, on the day after the arrival of the "American," the usual advertisement of it amongst the announcements of the arrival and departure of vessels, and that he immediately took delivery of some bullion consigned to him by the same vessel, but said that he did not recollect to have seen Remington & Co.'s advertisement in the *Times of India*. He took no step towards taking delivery of the goods, the subject of this suit, until between 2 and 3 P.M. on Saturday the 27th of February, when he wrote the following letter to Remington & Co :—

"*Bombay, 27th February* 1869.

"Messrs. REMINGTON & Co.,
Agents S. S. 'American,' Bombay.

DEAR SIRS,—Oblige us by stating if the following goods by above steamer are ready for delivery, *or if they are landed and sent to Government Warehouse.*

We remain, &c.,
p. pro. B. & A. HORMASJI,
N. A. HORMASJI."

Then followed a statement of the goods and their marks. N. A. Hormasji has deposed that he was on the same day informed by one of his firm's *mukádams'* men that the goods bearing the marks (mentioned in the bills of lading) were lying on the Custom House wharf. He immediately wrote to Somjibhái Visrám a formal letter (not in evidence). On Monday morning (the 1st of March) N. A. Hormasji received a message from Somjibhái Visrám that he would call in the course of the day to settle the matter. He did so call, and while in conversation with N. A. Hormasji, the fire, which I shall presently mention, was reported as having then broken out, and Somjibhái Visrám (by which name I presume the witness meant to indicate Ján Muhammad Somji, the son of Somjibhái Visrám, who managed his father's business, his father being too old to conduct it himself) went to the Custom House. Remington & Co., under date the 1st of March (Monday) 1869, before the fire had occurred, replied to N. A. Hormasji's letter of the 27th of February, as follows :—

"We are in receipt of your letter dated 27th instant, and in reply thereto beg to inform you that the steamer 'American' completed the discharge of her cargo some days ago, and the goods have been stored in the Government warehouse."

The goods, in fact, were lying upon the Custom House wharf, and had not been warehoused. But I have no doub, that Messrs. Remington and Co., when writing that letter of the 1st of March, were under the impression that the goods had been warehoused. It appears from the evidence of their clerk, Motibhái Sundarji, who usually attended to their business at the Custom House, that Mr. Baumbach, one of the assistants in their firm, directed that clerk to cause the goods, which had come in boats alongside the Custom House wharf, to be placed in the Government warehouse, and that order they must have supposed to have been obeyed.

The discharge of the cargo of the 'American' seems to have commenced on the 18th of February. Many of the consignees landed their own goods. The goods the subject of this

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suit, appear to have been landed by Hari Bhánji, *mukádam* of Remington & Co., between the 20th and 24th of February. Whether that landing took place with the consent of Somjibhái Visrám or not, is a point on which there is conflicting evidence. Any real difficulty which occurred about the landing is, I think, attributable to the not unusual cause of such difficulties, namely, the rivalry between the *mukádam* of the agents of the master and the *mukádams* of the respective consignees, as to which of them should have the landing of the goods and the recompense consequent on the performance of that duty, and not to any unwillingness on the part of the consignees that the landing should take place. The evidence of Mr. Forman and other gentlemen shows that cargo from China is so valuable that consignees are generally anxious to obtain delivery as soon as possible. I have come to the conclusion that the landing was made with the consent of the firm of Somjibhái Visrám. Ján Muhammad Somji, its manager, admits that Ransord Madan was their *mukádam* for business within the Fort, in which the Custom House is situated, but denies that he authorised Ransord Madan to land the goods, although admitting that he knew of the arrival of the steamer, and that he had some conversation with Ransord about the goods four or five days after the arrival of the ship. Ransord also denies that the firm of Somjibhái Visrám authorised him to consent to the landing of the goods by Hari Bhánji, and states that he (Ransord) was concerned about the landing from the "American" of the goods of one Edalji Dádábhái, and that his negotiations with Hari Bhánji were with respect to those goods only, and that he and the *mukádams* of certain other consignees signed an agreement as to the rates at which Hari Bhánji might charge for the landing. It seems to be the fact that he did act on behalf of Edalji Dádábhái, and on other occasions frequently acted as *mukádam* for other Memon and Khojá merchants, besides Somjibhái Visrám. I place but little reliance on Ransord's testimony, and on that of Ján Muhammad Somji, so far as they ignore the fact of Ransord acting on the occasion for the firm of Somjibhái Visrám. And although it is true Somjibhái Visrám had

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not then the five bills of lading relating to the goods the subject of this action, and had only the bill of lading for some aniseseed consigned to him by the "American," yet his firm was so far interested in the goods mentioned in the five bills of lading as to prevent there being any *à priori* improbability in the evidence of Kávasji Edalji, *dubásh* to Remington & Co., who seems to me to be a trustworthy witness. If his evidence be true, as I think it is, Somjibhái Visrám did authorise Ransord to see to the landing of the goods, and Ransord sanctioned the landing of them by Hari Bhánji. Kávasji Edalji's evidence is strongly supported in several points by other witnesses called for the defendant. It appears, too, from the evidence of Nasarvánji Ardesar Hormasji that his firm, B. & A. Hormasji, considered that it was the business of the firm of Somjibhái Visrám to apply for the goods. They had not, however, supplied Somjibhái Visrám with the bills of lading, without which he could not have obtained delivery of the goods. It unquestionably was the duty of B. & A. Hormasji, as holders of the bills of lading, to have taken proper measures in proper time, whatsoever that may have been, to have obtained delivery of the goods. When the goods were about to be landed, Ransord and the other *mukádams* objected, probably on the ground of expense, to their being placed in a Government warehouse, and preferred that they should be placed on the Custom House wharf, which was done, and those goods bearing Somjibhái Visrám's marks were separated from the rest, and placed together on the wharf. Notwithstanding what Ján Muhammad Somji and Ransord may have said to the contrary, I think it has been established that one Nansi Visrám was directed by Ransord to look after the goods of Somjibhái Visrám after they had been placed on the Custom House wharf, and that he did so; but it is also quite clear that Hari Bhánji and his men, on behalf of Remington & Co., although tolerating the presence of Nansi Visrám, continued in possession of the goods until the occurrence of the fire, which broke out about noon on Monday the 1st of March in the Post Office, and eventually extended to part of the Custom House, and

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destroyed or damaged the greater portion of the goods contained in the five bills of lading. For the non-delivery of that portion this action has been brought.

The five bills of lading not having been produced to Remington and Co. up to the occurrence of the fire, Hari Bhánji, as *mukádam* to Messrs. Remington and Co., would, and did, according to the usage of that firm, continue in possession of the goods. The practice of that firm as to delivery of goods was stated by Mr. Fogo, a partner in it, to be, to give to the *mukádam* authority for delivery, by indorsement of that authority upon the bills of lading. The 4th paragraph of the defendant's written statement admits that Hari Bhánji, as *mukádam* of Remington and Co., was in charge of the goods landed from the ship for the purpose of preserving their lien thereon (*i.e.*, I presume, for the landing charges), and is inconsistent with the 3rd paragraph, which alleges a previous delivery to the servants of Somjibhái Visrám.

Assuming that the landing of those goods took place with the assent of Somjibhái Visrám, it has not, however, been shown that the plaintiffs' agents, Messrs. B. and A. Hormasji, had previously given any express authority to him to land them or to assent to their being landed. N. A. Hormasji says that he spoke to Somjibhái Visrám a few days after the arrival of the vessel about taking up the bill, but did not communicate with him about the goods until after he (N. A. Hormasji) heard, on the 27th of February, that the goods had been landed at the Custom House wharf. Even if he had seen Remington and Co.'s advertisement in the *Times of India* of the 18th of February, as I am strongly inclined to believe that he did, notwithstanding his assertion that he does not recollect to have seen it, yet that advertisement contains no definite statement of the time at which the goods were to be landed. His omission to prohibit the landing of the goods, therefore, cannot be considered an acquiescence in their being landed within any given time less than that usually allowed for such purposes, whatsoever that may be.

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It becomes necessary, then, to consider what, if the consignees do not come or send for the goods, would be, according to the custom of the port of Bombay, a proper time to elapse before the master should land the goods. The importance of this point does not appear to have struck the learned counsel for the defendant at the commencement of the plaintiff's case. Counsel for the defendant did, however, give notice at a sufficiently early stage of the plaintiff's case of their intention to dispute the view of the custom put forward on behalf of the plaintiffs, to prevent any surprise to their counsel from the nature of the evidence subsequently given on this subject on behalf of the defendant. The plaintiffs' counsel had full opportunity of adducing before Sir Richard Couch such evidence as they thought desirable to offer upon it, and availed themselves of that opportunity.

It has been contended for the plaintiffs that, until 15 days from the arrival of the vessel have elapsed, the master is not, according to the custom of this port, at liberty to land the goods without the permission of the consignees. In support of that view, the plaintiffs have called witnesses, amongst whom undoubtedly there are gentlemen of high respectability, incapable of saying anything which they do not completely believe; but I cannot help thinking that the idea of many of them as to the custom is borrowed from an indistinct recollection, or imperfect comprehension, of the provisions of Act VI. of 1863, and of the practice at the Custom House with reference to that Act, of which the 51st, 52nd, 53rd, 54th, and 55th sections have been much relied upon for the plaintiffs, as corroborating their allegation of the custom. That Act is not the earliest legislation on this subject. It was dealt with also by Act I. of 1838 (Secs: 44, 45) and Act I. of 1852 (Sec. 51). Of these, Act I. of 1838, Sec. 44, enacted that "when a Customs officer shall be sent on board of any vessel to superintend the delivery of cargo, twenty days, exclusive of Sundays and holidays, shall be allowed for the discharge of the import cargo of vessels not exceeding 600 tons burthen; and thirty days, exclusive of Sundays and holidays, for the dis-

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charge of the import cargo of vessels exceeding that burthen, and the said periods shall be calculated from the day when the Customs officer first went on board: and if the whole cargo be not discharged by the expiration of the above-mentioned periods, the master shall be charged with the wages of such officer, and other expenses, for any further period that such officer may be detained on board: *and if the owners, importers, or consignees do not bring their goods to land within the period above fixed, it shall be the duty of the master so to do.*" This then provides, not that the master may not land the goods within the fixed period, but that, if the owners, &c., "do not bring their goods to land within the periods above fixed, it shall be *the duty* of the master so to do." Sec. 45 related to cases in which a Customs officer was not sent on board, and enacted that the Collector of Customs might fix a period, not less than twenty days, for the discharge of cargo, and clearance of the vessel inwards, "and *if any goods remain on board after the time so fixed,* or after the time allowed in the last preceding section of this Act, the Collector may order the same to be landed and warehoused, for the security of the duties chargeable thereon, and of any freight and primage and other demands that may be due thereon, giving his receipt to the master for the same: *provided always that in all cases it shall be lawful for the Collector or other officer in charge of the Custom House, with the consent of the master of the vessel, to cause any packages to be brought on shore, and to be deposited in the Government warehouses, for the security of the duties and charges thereon, although twenty days may not have expired from the entry of such vessel;* and in case any goods brought to land from any vessel be not claimed, and cleared from the Custom House within three months from the date of entry of the ship in which such goods were imported, it shall be competent to the Collector to sell the same on account of the duty and other charges due thereon; and the balance remaining after deducting the said duties and charges, shall be held in deposit, and paid to the owner on application." This section, so far from prohibiting, clearly contemplates a landing within the

time prescribed, whether or not the owner, importer, or consignee may have consented. It also enables the master to rid himself of the custody of the goods without losing his lien for freight, &c. Act I. of 1838 was repealed by Act I. of 1852, the 51st section of which is as follows:—"Except in special cases sanctioned by the Collector of Customs, twenty days, exclusive of Sundays and holidays, shall be allowed for the discharge of the import cargo of vessels not exceeding six hundred tons' burthen, and thirty days for vessels exceeding that burthen; and the said periods shall be calculated from the date on which the vessel was admitted to entry inward; and if any goods remain on board after the periods above fixed, the Collector may order the same to be landed and warehoused, for the security of the duties chargeable thereon, and of any freight and primage and other demands that may be due thereon, giving his receipt to the master for the goods so warehoused; but the Collector or other officer in charge of the Custom House, with the consent of the master of the vessel, may cause any packages to be brought on shore, and to be deposited in the Government Warehouse, although the periods above fixed have not expired." Of this, as of the previous enactment, I may say that it certainly does not prohibit a landing by the master within the prescribed period, without the consent of the consignees, but does in fact contemplate that before the expiration of that period such a landing may take place. Act I. of 1852 has been repealed by Act VI. of 1863, the Act in force when the cause of action in this case is alleged to have arisen.

Secs. 51, 52, 53, 54, and 55 of Act VI. of 1863, I have already mentioned as having been much relied upon for the plaintiffs in support of their allegation of the custom. It cannot, however, be affirmed that any one of these sections in express terms prohibits a landing of goods within fifteen days without the consent of the consignee. But the prohibition is sought to be implied from those sections. To us, however, it seems that their objects were only these: namely, 1st, to lay down the time during which the officer of Customs, under whose especial surveillance the import cargo is placed, should remain

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on board without charge to the vessel, and the rate at which she should be charged for hire after the expiration of that time; and 2ndly, to lay down the time, not at which the cargo might be landed without the consent of the consignee, but rather at which the master of the vessel, in the event of the consignee not of his own accord taking delivery of the goods, ought to relieve himself altogether of the custody of them, and at which also it should be compulsory upon the principal officer at the Custom House to take them into his own charge, and to hold them, "until the freight, primage, duties, and other charges to which such goods are liable, shall be paid." That object, then, was to confer a boon, and not to impose a restriction, upon the master; to enable him to part with the goods, and yet to preserve his lien for freight &c. upon them; and not to deprive him of any rights as to landing which he may have according to the custom of the port.

Act XVII. of 1869, which received the assent of the Governor General of India on the 11th of August 1869, *i.e.*, four days after Sir Richard Couch gave his judgment in this cause, has been mentioned by counsel for the plaintiffs in aid of their argument. But we doubt whether more can be inferred from it than that the Legislature wished to enable the local Government from time to time to fix a period within which the master of a vessel may relieve himself altogether of the custody of the goods without losing his lien for freight, &c., and the Customs officer should be compelled to take charge of them, which period should be more conformable to that within which the custom of the port authorises, or hereafter may authorise, the master to land the goods, than that fixed by Act VI. of 1863.

For the plaintiffs it has been said that the evidence of Mr. Jervis and Méhérjibhái Bápuji Vikháji, two Custom House officers, shows that the practice of the Custom House is not to permit the landing of goods within fifteen days, except on the consent of consignees, or when the bill of lading provides for a shorter time. It is, however, manifest from the note made by Mr. Jervis on the 18th of February 1869, on Remington

and Co.'s letter of the previous day, requesting permission to land the cargo of the "American" at the Custom House Bandar, and from the evidence of Mr. Fry, that there is at least one further exception, namely, when the master chooses to forego his lien for freight &c. on the goods landed.

The evidence of many other witnesses, however, shows that there really is no difficulty in landing goods at the Custom House long before fifteen days have elapsed, although the Custom House officers may not take them into their exclusive charge unless the landing has been made with the consent of consignees, or when the bill of lading provides for a shorter time than fifteen days, or the master waives all lien for freight, &c. When the landing within fifteen days takes place in any case not within these exceptions, the master, by his agents, has the custody of goods lying on the wharf, and the consignees, after paying the freight, &c., and landing charges, take delivery on the Custom House Bandar. In the present case the freight appears to have been paid in Hongkong, and the only claim against the goods would seem to have been the landing charges.

Mr. Fry, Assistant of Remington & Co., had an interview with Mr. M. B. Vikháji at the Custom House on the 18th of February 1869, and the latter, after consulting Mr. Jervis, then made a note, on behalf of the Deputy Commissioner of Customs, below that of Mr. Jervis, on Remington & Co.'s letter of the 17th of February, as follows:—"Permission granted to land the cargo, as there is provision made in the bills of lading of the vessel." Mr. Fry, Mr. Jervis, and Mr. Vikháji were apparently at first under the impression that such a provision was made in all of the bills of lading. Subsequently, a difficulty having been made in consequence of the omission in some of the bills of lading of that provision, Mr. Fry had, on the 19th or 20th of February, a second interview with Mr. Vikháji, who said that, in consequence of that omission, the permission to land the goods must be withdrawn; however, on the agreement, of which I have already spoken, being made amongst the *mukádams* of the consignees to land

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the cargo at certain rates, the Custom House officers allowed it to be done.

This also appears from the evidence of Hari Bhánji and of Mr. Williamson, a Customs officer, and is touched upon by Moṭibhái Sundarji.

As to the points in which Mr. Fry and Mr. Vikháji differ, I prefer the evidence of Mr. Fry. He states that goods cannot be landed within fifteen days from the entry of the vessel, unless the Custom House authorities give permission, and that he has known it to be done without the consent of the consignees. That it is a common practice, as already said, for the masters of vessels, and their agents, to land within fifteen days is manifest not only from the evidence of many witnesses for the defence, but also from that of some of the plaintiff's witnesses: for instance, Mr. De Quadros, speaking of both sailing ships and steamers, says: "If the goods are landed before fifteen days are out, we retain them in charge of our *mukádam* at the Custom House;" and again, on cross-examination, "We have often landed goods before the fifteen days are out." Mehervánji Máṇikji, another of the plaintiffs' witnesses, said: "Goods were landed by us from the 'Star of India' within fifteen days. We landed on our own responsibility. She was a sailing vessel." On cross-examination he added: "I have heard of other instances, besides the 'Star of India,' where the landing has been within the fifteen days." The extent of the responsibility of which that witness spoke, shall be presently considered.

What the custom of the port of Bombay may be as to landing goods, is a question of fact. In the recent case of *Gray* v. *Turnbull* in the House of Lords (*a*), Lord Chelmsford and Lord Westbury strongly insist upon the prudence and necessity of abiding by the original decision upon a question of fact depending on evidence nearly balanced, unless it be shown irresistibly that the decision was erroneous. In *Gray* v. *Turnbull*, too, the evidence was upon written depositions,

(*a*) L. R. 2 Scotch & Div. App. 53.

and not taken, as in this cause, *viva voce* in the presence and hearing of the learned Judge who decided it; and no additional evidence was taken by, or offered to us. We should, therefore, in weighing the evidence, be fully satisfied that it clearly preponderated in favour of the appellants (plaintiffs) before we ventured to differ from the conclusion at which he arrived. We have perused the evidence with the greatest care, and so far from entertaining an opinion different from that of Sir Richard Couch, as to the result of the evidence upon the custom, we completely concur in his appreciation of it. He has set forth in his judgment the most important parts of it. It is unnecessary that we should repeat them, or do more than make a few comments upon it. We were surprised to find that such a custom, as that contended for by the appellants, had been set up, namely, that in the case of steamers and sailing vessels the master must, unless it please the consignee to take an earlier delivery of the goods, keep them on board for fifteen days. Such a custom appeared to us to be quite unreasonable, and we can only account for its having been set up in consequence of misapprehension, by some members of the mercantile community, of the legislation which has taken place, and more especially of Act VI. of 1863. Had such an inconvenient custom existed, it could hardly, I think, have been heard of in the principal courts here for the first time so late as 1869, when this cause was tried. I can, I think, safely say that during my own experience, from the beginning of 1854 until the hearing of this case in last year, there has not been any such custom put forward, either in the Supreme or High Court. The circumstance that the Peninsular and Oriental Steam Navigation Company, and other owners of steamers, have introduced into their bills of lading a special clause, enabling them to land goods immediately on arrival, has been advanced as an argument for the appellants in aid of the alleged fifteen-day custom, but that clause may have been adopted *pro majori cautelâ*, to get rid of any doubt created by legislation, or in order to enable the parties adopting the clause, if desirable or necessary, to compel the Customs authorities, under the present or former Customs Acts, to take the goods completely into

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their custody, and to hold them, subject to the lien for freight, &c. Mr. Brice, one of the witnesses for the appellants, says that "it is the practice for *all* steamers to land their goods immediately—they provide for power to do so." Other witnesses show that he is mistaken in supposing that all steamers make such a special provision to land their cargoes immediately; his statement, that as a matter of fact they all do so land their cargoes, tells strongly in favour of the respondent. Mr. Parker was unable to specify any instance of a steamer waiting fifteen days before landing her cargo, and even if he had been able to specify one or more instances, those may have been cases in which it suited the purposes of the owners or charterers of the vessels not to expedite their discharge. This remark is applicable to the evidence of several witnesses, for instance, Mr. Mackintosh and Chabildás Lallubhái. Mr. Parker's idea of the custom seems to be chiefly based upon what he supposes to be the provisions of the Customs Act, and not upon any actual experience. Being an officer of the Peninsular and Oriental Company, whose bills of lading stipulate for the right of immediate delivery, he was not likely to have had actual experience as to the practice of steamers or other vessels not specially making such a proviso. Mr. Forman, one of the appellants' witnesses, admits that if masters wish to land their goods within fifteen days they do so, but, he adds, "on their responsibility," the extent of which remains to be considered. Mr. Mackintosh, who appears to think that the detention of a steam vessel in harbour is not more expensive than that of a sailing vessel, is on that point at variance with Mr. Parker, Mr. Fogo, and Mr. Kittredge. Whether we regard their opportunities of knowledge, or the substance of what they have said as to the unloading of vessels in Bombay Harbour, we think that the evidence of Mr. Kittredge, Mr. Wilson, Mr. Owen, Mr. Henry Maxwell, and Mr. Moore is of great weight, and wholly irreconcilable with the existence of any such custom as that alleged by the appellants, namely, that the masters, either of sailing vessels or steamers, are bound to keep goods on board for fifteen days, unless in the meantime taken delivery of by the holders of the bills of lading. It is not

the case even with respect to sailing vessels, and *à fortiori* not so with respect to steamers. We think that it has been satisfactorily established that, at the expiration of a reasonable time from the arrival and entry of the vessel, which in the case of sailing vessels seems to be forty-eight hours, and in that of steamers somewhat less, the master is, according to the custom of the port, at liberty to land goods at the Custom House Bandar, or other place sanctioned by the Customs officers, if the holders of the bills of lading have not sent boats for their goods; and that this landing is lawful, and not a breach of duty or of the contract. We fully concur with the learned Judge in holding that such a landing is not a delivery under the bill of lading, that the consignee is bound to take delivery from the Customs Bandar, and to pay the proper charges for landing, the goods in the meantime remaining in the possession of the master by his agents. To indorsees of bills of lading there would, generally, be no means of giving notice of arrival except by public advertisement. The master or his agents would not in most cases, have any means of knowing who they were, until they notified that they held the bills of lading. In the present case, B. and A. Hormasji knew of the ship's arrival, and that she was discharging cargo, and actually had landed bullion from her.

I shall conclude my remarks upon the custom by observing that although Messrs. B. & A. Hormasji were aware of the ship's arrival on the 17th of February, and that fifteen days had not elapsed from that time, and possibly may not have heard of the landing of the goods which have been destroyed, they, by their letter of the 27th of February, show that they thought it probable that the goods had been already landed, for they ask if the goods "are ready for delivery, or if they are landed and sent to Government Warehouse."

And further N. A. Hormasji, of that firm, says: "The man that took the letter on the 27th, afterwards went to the Bandar. I told him to go and see if the goods bearing the marks were on shore. He said he saw some goods on the wharf bearing these marks." This shows not only that B. &

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A. Hormasji were well aware of the probability that the goods would have been landed before the fifteen days were out, but also where that landing would take place, namely, at the Custom House Bandar. These facts are important in the case of a firm with such large business connected with shipping as they have been represented as enjoying.

Whether or not in this particular case, under the peculiar circumstances under which the landing took place, the master continued liable as a common carrier on his bill of lading, it is unnecessary for us to express any positive opinion. It may be that inasmuch as B. & A. Hormasji knew on the 18th of February that the vessel arrived on the previous day, and shortly after took delivery of bullion consigned to them, and, therefore, knew that she was delivering her cargo, and must also be taken to know the established custom of the port, that the master of any vessel is at liberty, within a reasonable time after the arrival and entry of the vessel at the Custom House, to land the goods if the holders of bills of lading do not send for them, the master in this case might have some ground for contending that after the goods were landed on the Custom House Bandar, though they must be considered as undelivered and to have remained in his custody, they did so not in his capacity of common carrier, but as warehouseman (*b*).

Upon that point we shall not express any opinion, because, even assuming that his liability as a common carrier continued, we concur with Sir Richard Couch in thinking that the master, having landed the goods, according to the custom of the port, within a reasonable time after the entry of the vessel, and being free from any imputation of negligence or breach of duty, is protected by the special exception of "fire" contained in the bills of lading.

It has been contended for the plaintiffs that the scope of that exception must be controlled by the word "other" preceding the words, "dangers and accidents of the seas, rivers,

(*b*) *Garside* v. *Trent and Mersey Navigation Co.*, 4 T. R. 581.—Angell on Carr. pl. 302—305 *et seq.*, 4th ed.

and navigation, of whatever nature or kind soever;" but we cannot accede to that argument. Fire, no doubt may occur at sea, as well as on shore, but it never has been regarded as a peril, danger, or accident of the sea within the meaning of those terms as known to mercantile usage or the law.

In his work on "Perils of the Sea," Mr. Baily defines them as "all losses caused by the action of wind and water acting on the property insured under extraordinary circumstances, either directly or mediately, without the intervention of other independent active external causes" (*c*). Sir Joseph Arnould says of "perils of the seas" :—"Under these words are embraced all kinds of marine casualties, such as shipwreck, foundering, stranding, &c., and every species of damage done to the ship or goods at sea by the violent and immediate action of the winds and waves, as distinct from that included in the ordinary wear and tear of the voyage, or directly referable to the acts and negligence of the assured as its proximate and sole conclusive cause." (*d*) Wharton (referring to Jones on Bailments, p. 98), in defining "perils of the sea," says, "They are strictly the natural accidents peculiar to the water, but the law has extended this phrase to comprehend events not attributable to natural causes, as captures by pirates (*e*), and losses by collision, where no blame is attributable to either ship, or at all events to the injured ship (*f*). The word '*peril*,' like '*periculum*,' Lat., from which it is derived, is in itself ambiguous, and sometimes denotes the risk of inevitable mischance, and sometimes the danger arising from the want of due circumspection."

Kent (Vol. III., p. 301, 10th ed.) says: "Perils of the sea denote natural accidents peculiar to that element which do

(*c*) Page 6, ed. of 1860; and *see* p. 2.

(*d*) Vol. II. p. 817, 2nd ed.; and *see* pp. 826, 827, *et seq.*, and p. 1326.

(*e*) 2 Arnould, 841 (2nd ed.) *Pickering* v. *Barklay*, Style 132; S. C. 2, Rol. Abr. 248, pl. 10; *Barton* v. *Wolliford*, Comberbach 56. Not so if the vessel fall into the hands of pirates by the negligence or fault of the master: Emerigon, tom. i., 532. The owners are responsible for a robbery in the Thames: *Morse* v. *Slue*, 1 Ventris 190.

(*f*) *Smith* v. *Scott*, 4 Taunton 126; *Buller* v. *Fisher*, 1 Esp. 67; Abbott on Shipping, 9th ed., p. 318, Pt. IV., ch. VI., pl. 2. See L. R. 1 C. P. 600.

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not happen by the intervention of man, nor are to be prevented by human prudence." The only exception which he admits to the definition is loss by pirates.

In *Kay* v. *Wheeler* (*g*) the bill of lading contained the usual exceptions: "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what kind and nature soever;" the goods shipped under that bill of lading were injured during the voyage by rats, although the ship-owner had taken every possible precaution to prevent it. The Court of Exchequer Chamber affirmed the judgment of the Court of Common Pleas, by which it was held that the cause of injury did not come within either the exception of perils of the sea, or any of the other exceptions. Nor is a loss caused by worms, which have destroyed a ship's bottom, a loss by perils of the sea: *Rohl* v. *Parr* (*h*).

I have not met with any decision to the effect that a loss by lightning could be regarded as a loss by perils of the sea. It certainly, however, would be a loss by the act of God (*i*), and the carrier is by the Common Law not responsible for losses by the act of God or the Queen's enemies. But for a loss or injury by fire occasioned by other means than lightning he is at Common Law liable: *Forward* v. *Pittard* (*j*).

The only exception formerly made in bills of lading was of perils of the sea (*k*). To this exception the Common Law, as we have seen, added the act of God and the Queen's enemies, but, fire by means other than lightning being deemed not to fall within any of these three exceptions (*l*), it was enacted by Stat. 26 Geo. 3, c. 86, s. 2, "that no owner or owners of any ship or vessel shall be subject, or liable to answer for or make good, to any one or more person or per-

(*g*) L. R., 2 C. P. 302, and see *Hunter* v. *Potts*, 4 Camp. 203.

(*h*) 1 Esp. 445. (*i*) 3 Kent 302 (10th ed.).

(*j*) 1 T. R. 27; Angell on Carr., chap. VI., pl. 156, 157, *et seq.*, pp. 134—137, 4th ed.

(*k*) Abbott on Shipping, 9th ed., p. 316, Part IV., ch. vi., pl. 2.

(*l*) *Ibid.*, p. 320, Pt. IV., Ch. vi., pl. 3; 3 Kent 302, 10th ed.

sons, any loss or damage which may happen to any goods or merchandise whatsoever, which from and after the 1st of September 1786 shall be shipped, taken in or on board any such ship or vessel, by reason or means of any fire happening to or on board the said ship or vessel." In this enactment the master is not mentioned; and, therefore, Lord Tenterden says: "It may be doubtful whether his responsibility is in this case removed by the statute: but the insertion of the word *fire* in the modern bill of lading has certainly removed it" (*m*). The Merchant Shipping Act 1854, s. 503, which is as follows: "No owner of any sea-going ship, or share therein, shall be liable to make good any loss or damage that may happen without his actual fault or privity of or to any of the following things (that is to say):—(1) Of or to any goods, merchandise, or other things whatsoever taken in or put on board any such ship, by reason of any fire happening on board such ship," &c., "to any extent whatever," is also silent as to the master, and is conversant only of fire "happening on board such ship."

Mr. McLauchlan, in his book on Shipping, has the following note at page 109 *n* :—

"Under the operative words in the 26th Geo. 3, c. 86, § 2, which were 'shipped, taken in or put on board such vessel,' it was held that goods destroyed by fire while on board a lighter not belonging to the owners of the ship, for the purpose of being conveyed from the shore to the ship, were not within the intention of the Act, and the owners were responsible for them as at Common Law: *Morewood* v. *Pollok*, 1 E. & B. 743 (*n*), an interpretation which appears to apply to the present Act (*o*). Of course, if the goods are not in the ship, but put out of it, on shore, and without notice to the consignees, when they are destroyed by fire, the only defence of the owners is at Common Law: *Bourne* v. *Gatliffe*, in error, 11 Cl. & F. 45; 7 M. & G. 850."

In *Bourne* v. *Gatliffe* the point here did not arise, because there was not in the bill of lading any exception of fire. Nor

(*m*) Abbott on Shipping, Part IV., ch vi., pl. 3. (*n*) S. C. 21 L. T., 86.
(*o*) Merchant Shipping Act 1854, s. 503.

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did the point arise in *Morewood* v. *Pollok;* the declaration there averred that the goods were to be delivered to the plaintiffs, "the dangers of the sea only excepted," which averment was not traversed by the plea, on demurrer to which that case was disposed of. The court, too, relied on the words of the statute as showing that, "to bring a case within the Act, the fire must be on board a ship which is the property of the defendants" (*p*).

Mr. Latham, in his argument for the respondent, suggested that the special exception of fire was introduced into bills of lading subsequently to, and in consequence of, the decision in *Bourne* v. *Gatliffe,* pronounced in the House of Lords in 1844. It is true that in the sixth edition of Beawes' Lex Mercatoria, published in 1813, the form of bill of lading given (Vol. I., p. 196) only excepts the dangers of the sea, and in two out of three forms of bills of lading given in Montefiore's Commercial Precedents, published also in 1813, pp. 111, 112, the exceptions are, "all and every the dangers and accidents of the seas and navigation, of whatever nature and kind soever;" but in the third form in the same book (p. 112) the exceptions are "the act of God, the King's enemies, *fire,* and all every other dangers and accidents of the seas, rivers, and navigation, of whatever nature, save risk of boats so far as ships are liable thereto." Mr. Scoble has also stated that in an edition of Abbott on Shipping, published in 1802, the exception of fire is mentioned.

The case of *De Rothschild* v. *The Royal Mail Steam Packet Company* (*q*) has been referred to as authority for the proposition that exceptions in a bill of lading should be construed strictly, but in the judgment (attributed in the Exchequer Reports to Parke, B., and by the Law Journal to Pollock, C.B.) the court lays it down that the ordinary meaning of the words used must be followed, and the circumstances under which the contract is made must be regarded; and it refused to adopt a meaning which it considered unreasonable, or unlikely to be within the intention of the parties. The

(*p*) Per *Lord Campbell, C.J.,* E. & B. 748; *et vide ibid.* per *Wightman, J.*
(*q*) 7 Exch. 734 S. C. 21, L. J. Exch. 273.

same doctrine has been applied to charter-parties: *Barker* v. *McAndrew* (*r*), *Bruce* v. *Nicolopulo* (*s*), *Brough* v. *Whitmore* (*t*).

The use of the word "other" before "dangers and accidents of the seas," &c., in the present bills of lading, cannot, we think, render "fire" a peril of the sea, or limit it to fire on board the ship. The reasonable mode of construing the contract contained in the bill of lading is to treat the exceptions as co-extensive with the liability. Were we to apply the word "other" so as to cut down the shipowner's and master's protection against fire to fire occurring on board the ship, we should be equally bound to apply it in the same manner to limit the exception of the acts of God and the Queen's enemies, so that if the goods, even though landed after the expiration of the fifteen days contended for by the appellants, were, whilst yet undelivered, to be destroyed by lightning, or by a hostile force at war with the Queen, the shipowners and master would be unprotected. This we do not think could have been the intention of the parties. It may not be inappropriate here to mention *Gage* v. *Tirrell* (*u*), an American case mentioned in Angell on Carriers (*v*), in which the court, after careful consideration, held "that a common carrier did not, by giving a bill of lading which contained only the exception of perils of the sea, thereby make a special contract to deliver subject only to this exception, but that he was excused from delivery if prevented by the act of God or the public enemy." In *Pelly* v. *The Royal Exchange Assurance Company* (*w*), loss of rigging, sails, &c. accidentally burnt on a sandbank, where such articles are generally stowed in the Canton river by the usage of the Chinese trade, was held to be a loss by fire under the common form of policy on the ship, her tackle, &c., on a voyage from London to China and back to London, because there was no fault in the master, inasmuch as he acted in the usual course (*x*); and the defendants, the insurers, must be taken to know the

(*r*) 11 Jur. N. S. 637. (*s*) 11 Exch. 129, S. C. 24, L. J. Exch. 321.
(*t*) 4 T. R. 206. (*u*) 9 Allen 299.
(*v*) 4th ed., note (*a*) to pl. 294, pp. 260, 261. (*w*) 1 Burr. 341.
(*x*) *Ibid.* 348, 351.

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custom of the port, and, in taking the risk, to have contemplated that what was usual or necessary would be done.

Sir Joseph Arnould (*y*), in discussing the continuance and end of the risk under a marine policy on goods, after referring to the authorities which show that where a usage exists, by the general course of trade, to employ smaller craft such as lighters, shallops, &c., to carry the goods from the ship to the shore, the underwriters will be liable for any loss or damage which may happen to the goods in the course of being so carried from the ship to the shore, mentions a case (*Osacar* v. *The Louisiana Insurance Co.* (*z*), decided in the Supreme Court of the United States, in which the same principle was carried to the extent of protecting goods destined for a Mexican port (Soto la Marina) while being carried up from the river-bar to the town, partly in boats, and *partly overland on mules*, that being shown to be the general mode of conveying them to their place of destination.

There is an instance in a charterparty in *Gilkison* v. *Middleton* (*a*), and also in Maude and Pollock on Shipping, 229 (3rd ed.), of the very loose manner in which the word "other" is used. The exceptions are "the act of God, the Queen's enemies, fire, *strike of pitmen*, and all other damages and accidents of the seas, rivers, and navigations, of what nature and kind soever, throughout the voyage." It would be absurd to hold that a strike of pitmen on board the ship only was intended.

The language of the five bills of lading in this case leads to the conclusion that the exception of fire is co-extensive with the contract to deliver, and does not limit the protection to the time during which the goods are in the ship. The landing of the goods appears to us to have been in conformity with the custom of the port, and without default on the part of the master. For these reasons, we affirm the decree with costs.

Decree affirmed with costs.

Attorneys for the appellants: *Hearn, Cleveland, & Peile.*

Attorneys for the respondent: *Keir, Prescot, & Winter.*

(*y*) Vol. I., 482, *et seq.*, 2nd ed.

(*z*) 5 Martin N. S. 386; and see 1 Phillips on Ins., 3rd ed., p. 537.

(*a*) 2 C. B., N. S., 134, 137.

CASES

DECIDED IN THE

APPELLATE CIVIL JURISDICTION

OF THE

HIGH COURT OF BOMBAY.

Referred Case.

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Jan. 18.

SANGA'PPA' bin NINGA'PPA'.....*Plaintiff.*
BASA'PPA' bin PARA'PPA' and another...*Defendants.*

Registration—Bond—Interest in Land—Distinct Promise to pay—Act XX. of 1866, *Secs.* 17 *and* 48.

Where a bond or other instrument, creating an interest in land, also contains a distinct promise to pay the money due under it, such bond or instrument is evidence in a suit brought to recover the money only.

CASE referred for the decision of the High Court by J. R. Naylor, Senior Assistant Judge of Kalládgi, under Sec. 28 of Act XXIII. of 1861.

"This is a suit to recover 246 rupees, being the amount of principal and interest due on a bond. The bond is as follows:—

'We have borrowed from you 200 rupees for a necessary purpose. The time for repaying is the harvest season of this year. For this money we mortgage a field and a pair of bullocks. We mortgage these both for the above sum of money. At the above date we will sell the crops of the field, and the bullocks, and pay the above money. After doing this, whatever money remains still due we will pay interest on at the rate of four pies per rupee per month. Dated the 12th of Bhádrapad of the Shak year 1789.'

"The First Class Subordinate Judge held that the registration of this bond was compulsory, under cl. 2 of Sec. 17 of Act XX. of 1866, and, as it was not registered, he held it inadmissible in evidence.

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"In appeal it is urged that the land is pledged as a mere collateral security, and that the suit has been brought as upon a mere money bond, and that therefore the bond may be admitted in evidence for the purposes of this suit, as was decided by the Calcutta High Court in the case of *Woodoy Chand Jana* v. *Nitye Mundul* (*a*), followed by the case of *Gopal Perhsad* v. *Mussamut Nuzzerance* (*b*).

"The question for the decision of the High Court is whether the land is to be considered as pledged merely as a collateral security, and if so whether on this ground registration was not compulsory.

"I am of opinion that registration was compulsory. I cannot see that the question of compulsory or optional registration, in any way, depends upon the nature of the suit that may be brought upon such bond. There is a later decision of the Calcutta High Court, in which another division of the Court seems to have dissented from the old rulings, and held that an instrument which creates a lien upon property in favour of a person who has lent money creates an interest in land in favour of the lender of the money, and therefore such an instrument is not admissible in evidence unless registered: *Kala Chand Mundul* v. *Gopal Chunder* (*c*). The present bond creates a charge upon land to the extent of 200 rupees and upwards, and registration, therefore, was compulsory; and, not being registered, such a bond cannot, under Sec. 49 of the Registration Act, be admitted in evidence or given effect to."

The case was this day considered by COUCH, C.J., and MELVILL, J.

PER CURIAM:—The Court is of opinion that in this suit, which is only brought to recover the principal and interest due on the bond, the bond, which contains a promise to pay the money as well as a mortgage, is admissible in evidence without having been registered under Act XX. of 1866: see *Luchmeeput Singh* v. *Mirza Khyrat Ali* (*d*), and *Vellaya Padyachy* v. *Moorthy Padyachy* (*e*).

(*a*) 9 Calc. W. Rep., Civ. R. 111. (*b*) 10 Ibid. 252. (*c*) 12 Ibid. 163.
(*d*) 12 Calc. W. Rep., F. B. R. 11. (*e*) 4 Mad. H. C. Rep. 174.

Referred Case.

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Jan. 18.

GIRDHAR DALPAT .....*Plaintiff.*
HARIBHA'I NA'RA'YAN.....*Defendant.*

Registration—Refusal to get Instrument registered—Implied Contract—Right of Suit.

Whether an action will lie against the maker of an instrument requiring registration to render it valid, for a refusal to get such instrument registered, depends upon the question whether there is a contract, express or implied, on the part of the maker to register it. Such a contract is not to be implied in every case.

CASE referred for the opinion of the High Court by Ráv Bahádur Gopálráv Hari Deshmukh, Judge of the Court of Small Causes at Ahmedábád, under Sec. 22 of Act XI. of 1865.

"The plaintiff brought an action for damages against the defendant for default in not duly registering a bond which the defendant had passed to the plaintiff for an old book-debt, in which bond the defendant had mortgaged a house as security for the debt. The plaintiff says he asked the defendant to accompany him to the Registration Office, and that the defendant promised to come, but put it off till the four months' time prescribed had elapsed.

"The defendant says that the plaintiff took away the bond and neglected to register it. Further, that the plaintiff had a right to present it himself at the Registration Office, and summon the defendant; and, not having done so, the plaintiff could not now sue him, the defendant, for damages.

"The evidence shows that the plaintiff asked the defendant to accompany him, but that the defendant put off doing so till the four months' period had expired. The plaintiff did not present it himself at the office, though he could have done it, and the bond remained in his hand unregistered. Before bringing his present suit, the plaintiff sued the defendant on the entries in his books, when it was decided that the claim, dating from the entries, was time-barred.

"The question for the opinion of the High Court is, whether or not a claim for damages, alleged to be incurred by the

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plaintiff in consequence of a bond which he obtained from the defendant not being duly registered, is maintainable.

"I am of opinion that the claim is maintainable. The Calcutta High Court has decided that a defendant who executed a bond was bound to get it registered, so as to enable the plaintiff to enforce it: *Probooram Hajrah* v. *Robinson* (*a*)."

The reference was considered by COUCH, C. J., and MELVILL, J.

PER CURIAM:—The Court is of opinion that the suit is not maintainable. There is no agreement in the bond that the mortgagor will get it registered, and there is no implied contract on his part to do so, as there was in the Calcutta case quoted by the Judge.

(*a*) 11 Calc. W. Rep., Civ. R. 398.

Feb. 2.

Special Appeal No. 532 *of* 1869.

GIRDHAR PARJA'RA'M .....*Appellant.*
DA'JI DULABHRA'M and MOTI DULABHRA'M .....*Respondents.*

Hindú Law—Sale of Land—Possession.

Though, by Hindú law, on a sale of land it is not absolutely necessary that the purchaser should be put in possession, it is requisite that the vendor should, at the time of sale, be in possession of the property sold.

THIS was a Special Appeal from the decision of E. T. Candy, Acting Assistant Judge at Ahmedábád, in Appeal Suit No. 57 of 1867, confirming the decree of the Ṣadr Amín.

The plaintiff, Girdhar Parjárám, brought this suit to compel the defendants to pull down a partition wall, which they had built between their property and the plaintiff's, and to restore certain ground which they had encroached upon. The plaintiff alleged that he had purchased the ground from one Gavrishankar, the original proprietor, by a deed of

sale, dated the 28th of June 1864. The deed of sale did not contain the measurement of the ground sold.

The defendants answered that the partition wall had been built before the plaintiff purchased the house, and that they had not encroached upon the plaintiff's ground.

The Ṣadr Amín found that the defendants had erected the partition wall and made the alleged encroachments in January 1866, while the plaintiff's deed of purchase bore date the 28th of June 1866; and that, as the partition wall was built before the plaintiff bought the house, his claim would not lie against the defendants.

The plaintiff appealed from this decision to the District Court. The Acting Assistant Judge gave the following judgment:—

"I find that the plaintiff's claim will not lie against the defendants.

"I take it as proved that the plaintiff bought the house and land in question after the supposed encroachments were made.

"The plaintiff sues to recover part of a house which was sold to him according to measurements noted in a former bond, which bond is not before this court, and therefore it cannot be ascertained what the plaintiff bought.

"If, after entering upon possession, the plaintiff found that the limits of the house were not according to the deed of sale, surely his remedy would lie against the seller; and then, when the seller pleaded that he was no party to the encroachment, the present defendants would be joined as co-defendants with the seller. The seller could never be joined as a co-plaintiff. Under any circumstances, the claim of the plaintiff will not lie against the present defendants alone."

The appeal was this day heard before COUCH, C.J., and MELVILL, J.

Shántárám Náráyaṇ for the appellant.

Nánábhái Haridás for the respondents.

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COUCH, C.J. :—Although, according to Hindú law, transfer of possession is not essentially necessary to give validity to a sale of immoveable property, yet it is essential that the vendor should have possession at the date of the sale. In a case decided by the Privy Council, their lordships are reported to have made the following observations :—"They" (the Judges of the Ṣadr Diváni Adálat) "seem to have ruled that the effect of the execution of a bill of sale by a Hindú vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession, giving to the instrument the effect of a conveyance operating by the statute of uses. Whether such a conclusion would be warranted in any case is, in their lordships' opinion, very questionable. It is certainly not supported by the two cases, *Gopeechurn Kur* v. *Koroona Dabee* (*a*) and *Surbonarayan Sing* v. *Maharaj Sing* (*b*), cited in the judgment under review, in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish his title? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency; of which the purchaser may claim a specific performance if he comes into court showing that he has himself done all that he was bound to do" (*c*). This is exactly the present case. The vendor could not sell property of which he had been dispossessed at the date of the sale. The sale, under such circumstances, could only, at the utmost, give a right to sue for the land of which the vendor had been dispossessed. The remedy open to the plaintiff, if he did not get all that was bargained for, was to sue the vendor for damages. This case, however, can be disposed of upon the first ground of the Assistant

(*a*) S. D. R. 1859, 225. (*b*) S. D. R. 1858, 101.

(*c*) Rajah Sahib Prahlad Sen *v.* Baboo Budhu Sing, 2 Beng. L. R., P. C. Ca. 111, 117.

Judge's judgment. The plaintiff has given no evidence to show what was the extent of the land which the deed of sale purported to transfer to him. There is nothing to prove that the old boundaries included the site under dispute, as the old sale-deed is not in court, and no reason is given why it was not produced in the court below. The plaintiff was bound to make out a complete ground for ejectment, by showing the precise limits of the land sold to him; and he has failed to do this. We accordingly confirm the decree of the lower court with costs.

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Decree confirmed with costs.

Referred Case.

Feb. 16.

MAGANBHA'I PURSHOTAMDA'S, a minor, by DVA'RKA'DA'S KAHA'NDA'S, agent of Girdharlál Likandás, administrator of the minor's estate .....*Plaintiff.*

VITHOBA' bin NA'RA'YAN SHET .....*Defendant.*

Procedure—Minor—Certificate of Guardianship—Foreign Guardian—Act XX. of 1864*—Suing by next Friend.*

The Bombay Minors' Act (XX. of 1864) does not apply to minors who are not resident within the Presidency of Bombay.

A foreign guardian will not be recognised in the courts in this country in a suit brought by such guardian to recover, on account of a minor, profits arising from immoveable property.

Where a suit was brought by the agent of a minor's guardian appointed by H. H. the Gaikwád of Barodá, it was ordered that the proceedings should be amended by describing such agent as the next friend of the minor, in which capacity he was then permitted to sue.

CASE referred for the opinion of the High Court by Janárdan Vásudevji, Judge of the Court of Small Causes at Puṇá, under Act XI. of 1865, Sec. 22.

"The suit, No. 3054 of 1869, has been brought, to recover from the defendant the rent of a house situated in Aditvár Peṭh of Puṇá, by Girdharlál Likandás as administrator of the estate of a minor, Maganbhái Purshotamdás, heir of

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Haribhái Bhaktidás, of Barodá, under a certificate of administration granted by His Highness the Gaikwád of Barodá.

"The defendant contends that the certificate of administration under which the suit has been brought, being one granted by a foreign power, can have no effect in British territory, and that the plaintiff, unless he obtains a certificate of administration to the estate of the minor, Maganbhái, from the Civil Court of the district, under Act XX. of 1864, has no authority to sue on behalf of the minor.

"The question for consideration is whether the certificate of administration granted by the Gaikwád's government to the plaintiff can be recognised in this district by international law.

"The rule recognised in England on this subject is stated in Story's Commentaries on the Conflicts of Law to be that 'no foreign guardian can *virtute officii* exercise any rights or powers or functions over the moveable or immoveable property of his ward which is situated in a different state or country from that in which he has obtained the letters of guardianship': (see paras. 504 and 504 *a*). Applying this rule to the present case, I am of opinion that the certificate of administration under which the plaintiff has brought this action, obtained, as it has been, from a foreign power, cannot be recognised in the British territory. His remedy is to procure its confirmation by the proper authority in this district before he can sue on behalf of the minor in any court here."

The reference was considered this day by COUCH, C.J., and MELVILL, J.

COUCH, C.J.:—We are of opinion that Act XX. of 1864 does not apply to minors who are not resident within the Presidency of Bombay. This is indicated by the preamble, but appears more clearly from Sec. 4 of the Act, which provides that, where the property of the minor is in more than one district, the application shall be made to the court of the district in which the minor has his residence; and subsequent sections show that the Act contemplates a guardianship of

the person as well as of the property of the minor in every case. The prohibition, therefore, in Sec. 2 of Act XX. of 1864, upon which the decision of the court in the Small Cause Court reference No. 24 was founded, has no application.

Although we concur with the Judge of the Small Cause Court in the opinion that the foreign certificate of guardianship cannot be recognised in a suit for the profits of immoveable property, we are of opinion that the minor may be allowed to sue by Dvárkádás Kahándás, the agent of the guardian, as his next friend, in accordance with the ordinary practice of courts in suits brought by infants. If this could not be done, a foreign minor would be disabled from suing for any injury to his property, or to recover any property he might be deprived of. All that appears necessary is that the plaint should be amended by describing Dvárkádás Kahándás as the next friend of the plaintiff, and he will be responsible for the costs of the suit.

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Feb. 16.

Special Appeal No. 121 *of* 1869.

PESTANJI MANCHARJI WA'DIA' .....*Appellant.*
JOSEPH MATCHETT and THOMAS NOWELL...*Respondents.*

Power coupled with an Interest not revocable—Debt due good consideration for such a Power—Stamp—Act X. of 1862, *Sch. A, cl.* 43*—Joinder of new Parties—Civ. Proc. Code, Sec.* 73.

Joseph Matchett executed in favour of Pestanji an instrument (authorising Pestanji to recover, by suit or otherwise, from Messrs. Windle and Nowell, a sum of Rs. 22,500 or thereabouts) which contained this clause :—"From whatever sum Pestanji may recover from Messrs. Windle and Nowell, he is to pay himself the sum of Rs. 8,640, *which is due to himself*, and also the expenses he may incur in making recovery, and he is to hand over the surplus to me."

Held that the above instrument was made upon a good consideration; that it was irrevocable; and that, operating as a power of attorney, and not as an assignment, it was properly stamped, under Act X. of 1862, with a stamp of Rs. 4.

Matchett, ignoring the above instrument, sued Nowell for the Rupees 22,500 mentioned in it. Pestanji thereupon applied to be made a party to the suit, under Sec. 73 of the Code. His application was granted, and he was joined as a co-plaintiff.

Held that Pestanji was properly made a party, but, as the validity of the instrument was disputed by Matchett, that Pestanji should rather have been joined as a defendant than as a plaintiff.

THIS was a Special Appeal from the decision of A. Lyon, Acting Judge of the District of Thánâ, in Appeal Suit No. 220, amending the decree of the Principal Ṣadr Amín of Thánâ.

The suit was brought by Joseph Matchett against Thomas Nowell to recover Rs. 25,593-8-0, due for work done by Matchett for the defendant on the Great Indian Peninsula Railway, the defendant having taken a contract from the Great Indian Peninsula Railway Company for the performance of certain work on that line.

Pestanji Mancharji was joined as a co-plaintiff, under the provisions of Sec. 73 of the Civil Procedure Code, at his own request. He founded his claim to be joined as a co-plaintiff upon a document in the following terms :—

"I do hereby authorise Pestanji Mancharji Wádiá to recover from Messrs. Nowell and Windle the sum of Rupees 22,500 or thereabouts, due by them for certain works done by me in the years 1865 and 1866, for them and on their account, on the railway line between Atgám and Kardi.

"The said Pestanji Mancharji Wádiá is to be at liberty to take any legal steps he may deem necessary to recover this claim from Messrs. Nowell and Windle, and also to settle or compromise and give discharges for the same, either privately or in any court of justice, as he may think proper, and the same shall be as valid as if I myself, personally present, would have done. And I do hereby undertake to ratify and confirm everything that the said Pestanji Mancharji Wádiá may do in respect of this claim, and shall sign any paper or papers that may require my signature and which he may want me to sign in respect of this claim.

"From whatever sum Mr. Pestanji Mancharji Wádiá may recover or get from Messrs. Nowell and Windle, he is first to pay himself, or deduct therefrom, the sum of Rupees 8,640 which is due to himself, as also the expenses which he may incur in making the said recovery, and hand over the surplus to me. Bombay, (dated) 13th September 1866.

(Signed) JOSEPH MATCHETT."

The above instrument bore a stamp of Rs. 4.

The defendant answered that the amount payable for the work done by Matchett amounted to Rs. 7,095-12-0, of which sum Rs. 722-3-0 had been paid to Matchett; the defendant offered to pay the balance, Rs. 6,373-9-0, on settling the accounts.

The Principal Ṣadr Amín awarded the claim to the amount of Rs. 14,341-4-0, including interest, out of which sum he ordered Rs. 8,000 to be paid to the plaintiff, Pestanji Mancharji Wádiá.

The defendant appealed from this decision to the District Judge of Thánáá. At the hearing of the appeal, Matchett, under Sec. 348 of the Civil Procedure Code, objected that the Principal Ṣadr Amín was in error in joining Pestanji Mancharji Wádiá as a plaintiff in the suit.

The following is an extract from the judgment of the Acting District Judge on this point:—

"In this suit the first question raised is, whether the co-plaintiff, Pestanji, has been properly joined as a plaintiff. I consider that he was improperly made a plaintiff, and that

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his claim must be dismissed with costs. The document on which he rests his claim, if it is intended to operate as an assignment to Pestanji Mancharji of the right to the Rs. 8,640 therein mentioned, is improperly stamped. This objection has been taken in the court below, and also in this court. The lower court came to no decision as to the stamp, but appears to have admitted the document in evidence. On permission being given by me to the co-plaintiff to pay the difference of stamp duty, he declined. Under the circumstances, I should be justified in refusing to receive the document in evidence. Without, however, basing my decision on this ground, I am of opinion that, even though it is admitted, Pestanji is not entitled to appear in this suit under Sec. 73 of the Code of Civil Procedure.

"I cannot do better, I think, with reference to this point, than quote the language used by Peacock, C.J., in a case in which a similar point arose (*a*): 'Although the intervenor claimed a portion of the subject-matter of the suit, he was not likely to be affected by the result of the suit, because, claiming adversely to the title both of the plaintiff and of the defendant, and not being a party to the suit, he would have not been bound by the decision.'

"In this case, the intervenor, Pestanji, is in this position. He claims adversely to the plaintiff as well as to the defendant, and both take objection to his being allowed to appear. Indeed, the principal objections are taken by the original plaintiff, such as that the document was improperly stamped; that the grantor of the power of attorney was entitled to revoke the authority, especially by reason of the lâches of the intervenor in not using the power, thereby preventing the grantor from recovering his just debts.

"None of these objections have been decided by the Principal Ṣadr Amín, and I think he was right in not deciding them, as they form the grounds of a separate suit between the plaintiff and the intervenor, and the only issues that

(*a*) *Jay Gobind Doss* v. *Goureeproshad* and others, 7 Calc. W. Rep., Civ. R. 202.

should be raised in this case are those between the plaintiff and the defendant, and not those which may arise between the plaintiffs themselves.

"The document in question must have either of two effects. It must either give the intervenor a title to sue the defendant for the debt, independently of any proceedings that may be taken by the plaintiff, or it is useless as revoked by the conduct of himself, or by the action taken by the plaintiff, or, otherwise, from its never having conveyed any title at all. In short, at the date on which the intervenor made his application, the document on which he relied was either still in force and gave him a right to sue, or it did not. In neither case is it possible that the result of the suit would affect him. In the first case his right to sue would still remain, and in the second he would have no right to sue at all, and could not, therefore, be injured by the loss of a right which he never had."

The District Judge amended the decree of the Principal Ṣadr Amín by directing that the claim of Pestanji Mancharji should be dismissed with costs, and that Matchett should recover from the defendant Rs. 7,095-12-0 with interest. He allowed no costs to the plaintiff.

From this decision Pestanji Mancharji Wáḍiá appealed, and the appeal was argued on the 19th of January before COUCH, C.J., and MELVILL, J.

Shántárám Náráyan, for the appellant:—The document is not insufficiently stamped, as a power of attorney, with a stamp of four rupees. Special powers of attorney require less, but none require more, than a four-rupees stamp. It is a power of attorney coupled with an interest, and is therefore irrevocable. As such, Art. 9 of the Stamp Act (1862) schedule applies, and not Art. 23.

The present case is distinguishable from the Calcutta case, referred to by the District Judge. Here Pestanji does not claim adversely to both parties, but claims through one of them.

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Marriott (with him *Dhirajlál Mathurádás*), for the respondent:—If the document operated as an authority to sue, Pestanji could only sue in Matchett's name, and should not be joined as co-plaintiff. If it operates as an assignment, it is insufficiently stamped, under Art. 25, Sched. A of Act X. of 1862. The objection is not taken too late: *A. Adinarayana* v. *Minchin* (*b*).

Branson appeared for Nowell, the defendant below.

Shántárám Náráyan in reply.

Cur. adv. vult.

February 16th. COUCH, C.J.:—Two questions are raised in this appeal:—(1) whether exhibit No. 15 is properly stamped as a power of attorney; and (2) whether the special appellant was entitled to appear in the suit. It is not material to the merits whether he should have been allowed to do so as a co-plaintiff or in some other way; but as Joseph Matchett sought to recover the entire debt, and disputed the right of the special appellant to receive it, Pestanji would more properly have been made a defendant.

It will be convenient to consider the latter of the two questions first. Exhibit No. 15 was given by the original plaintiff, Matchett, to the special appellant, Pestanji, and it purports to authorise the latter to recover from Messrs. Nowell and Windle (the former of whom is the defendant in this suit) Rs. 22,500 or thereabouts, due by them for contract work done by Matchett on the railway between Atgám and Kardi; the special appellant to be at liberty to take any legal steps he may deem necessary to recover the claim, and also to settle or compromise and give a discharge. From whatever sum the appellant may recover, he is first to pay himself or deduct 8,640 rupees, due to himself, as also the expenses which he may incur in making the recovery, and hand over the surplus to Matchett.

Now, where an authority or power is given for a valuable consideration or is part of a security, unless there is an express stipulation that it shall be revocable, it is, from its own nature

(*b*) 3 Mad. H. C. R. 297.

and character, in contemplation of law irrevocable, whether it is expressed to be so on the face of the instrument creating the authority or not. This rule has been acted upon in many reported cases, of which it will be sufficient to mention the following. In *Gaussen* v. *Morton* (*c*), A being indebted to B, in order to discharge the debt, executed to B a power of attorney authorising him to sell certain lands belonging to him, A. It was held that the authority could not be revoked. In *Bromley* v. *Holland* (*d*) Lord Eldon said that, where a power of attorney is executed for a valuable consideration, the Court of Chancery would not permit it to be revoked. And in *Walker* v. *Rostron* (*e*) Lord Abinger, in giving judgment, said, "The existence of a debt, although it be not due instanter, is a good consideration; and so it is to take lawful and proper means to provide for payment, even though they be conditional. If we were to hold otherwise, you might deny the consideration for a collateral security for any debt which might not be due at the moment, although it is a very common thing to require and obtain such security."

In this case the authority was given as a security for the debt of 8,640 rupees, admitted to be due; and if any new consideration was necessary, a proviso by the appellant not to sue Matchett, and to resort to the security for payment, might be implied. In *Gaussen* v. *Morton* it does not seem to have been considered that any new consideration was necessary, nor by Lord Abinger in the judgment we have quoted. In the *Alliance Bank* v. *Broom* (*f*) Vice Chancellor Kindersley took the same view of a transaction of this description. The ground of the doctrine, to use the language of Mr. Justice Story, is that "a party shall not be at liberty to violate his own solemn engagement or to vacate his own security by his own wrongful act, for that would be to allow him to perpetrate a fraud upon innocent persons who have placed implicit confidence in him, which is against the clearest principles of justice and equity" (Story on Agency, para. 477).

(*c*) 10 B. & C. 731. (*d*) 7 Ves. 28. (*e*) 9 M. & W. 411, 420.
(*f*) 34 L. J. Ch. 256.

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The decree of Mr. Lyon, the Acting Judge, in this case, by which, amending the decree of the Principal Ṣadr Amín, he dismissed the claim of the appellant with costs, and directed that Matchett should recover from the defendant the sum which he found to be due from him, really enables Matchett to perpetrate a fraud; and the appellant, who justly sought to prevent this, is saddled with costs.

It is difficult to see how the Acting Judge was able to arrive at the conclusion "that it was not possible that the result of the suit would affect the appellant," when the result of his decree was that the appellant, instead of receiving the money which he was entitled to, was left to obtain it by a suit against Matchett, who might be insolvent or leave India as soon as he received the money. That the appellant might sue the defendant, and that the defendant might be made to pay the debt twice, is an opinion which cannot have been seriously entertained by the Acting Judge. The judgment of Sir Barnes Peacock which he quotes has no application to such a case as the present, and we feel compelled to say we think a slight study of the case would have shown that it has not. There was no inconsistency between the title of the appellant to receive the debt, and the liability of Nowell to pay for the work which had been done. If the exhibit No. 15 can be admitted in evidence, the decree of the Acting Judge cannot be allowed to stand.

This document is in its terms a letter or power of attorney for the recovery of the debt. It could not operate as an assignment or conveyance of the debt, because, although irrevocable by Matchett, it would be revoked by his death: Story on Agency, paras. 488, 489.

It need not, therefore, be stamped as an assignment or conveyance. An instrument stating that goods had been deposited as a security for money lent, and authorising the lender to sell them, and out of the proceeds to pay the expenses of the sale and retain the debt and interest, was held not to require a mortgage stamp under the English Stamp Act: *In re Attenborough and the Commissioners of Inland*

Revenue (*g*). We think exhibit No. 15 is properly stamped, as a letter or power of attorney, with a stamp of four rupees, as the value of the property to be dealt with exceeded Rs. 500.

The decree of the Acting Judge, therefore, cannot be supported. We have, therefore, to consider what decree this court should make. The Acting Judge has decreed that the plaintiff, Joseph Matchett, should recover from the defendant Rs. 7,095-12-0 and interest at nine per cent. per annum from the date of the plaint. The appellant has stated, by his pleader, that he is willing to take what has been so found due, and that he does not desire to have the case remanded that he may be heard on the question of what is due. The Principal Ṣadr Amín awarded him Rs. 8,000, and he did not appeal against that. The decree of the Acting Judge should be amended, by striking out the part which dismisses the appellant's claim with costs, and adding after "from the date of the plaint till payment" the words "and it is ordered that out of the said sum so awarded there be paid to Pestanji Rs. 8,000 and interest at nine per cent. per annum from the 21st of April 1868, and that the residue, if any, be paid to the plaintiff Matchett; and if the sum awarded shall not be sufficient to satisfy the Rs. 8,000 and interest, the whole of it shall be paid to Pestanji Mancharji Wádiá."

MELVILL, J., concurred.

Decree reversed with costs.

(*g*) 11 Exch. 461.

Referred Case.

KA'SHIRA'M valad KRISHNA .....*Plaintiff.* March 1.

BHADU' BA'PU'JI.....*Defendant.*

Suit between Hindús—Verbal Abuse—Slander—Damages.

In a suit between Hindús in the Bombay Mofussil damages may be recovered for mere verbal abuse, without proof of actual damage resulting therefrom to the plaintiff.

CASE referred for the opinion of the High Court by the Honorable G. A. Hobart, District Judge of Khándesh, under Sec. 28 of Act XXIII. of 1861.

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"The plaintiff, Káshirám, sued to recover damages for defamation of character, alleging that in the presence of a numerous assembly, composed of caste-brethren, the defendant abused him, called his wife an unchaste woman, and his son a bastard. He seeks to recover the sum of 200 rupees as damages.

"The question is, whether a suit will lie for damages for mere verbal abuse, without actual injury or damage done to the plaintiff. I find that the utterance of slanderous words is proved as laid, but I am of opinion that the plaintiff is not entitled to recover damages, there being no allegation or proof of actual injury resulting from the abuse complained of. In coming to this conclusion, I follow the English law, which makes a distinction between spoken and written slander, and according to which mere abuse by word of mouth is not actionable unless it has caused some special damages to the plaintiff. I find that the Calcutta High Court has held otherwise, and ruled that verbal abuse causing no other injury than outrage to the plaintiff's feelings entitles him to sue for substantial damages: *Shaikh Tukee* v. *Shaikh Khoshdel Biswas* (*a*), *Gour Chunder* v. *Clay* (*b*), *Moulvie Gholám Hossein* v. *Hur Gobind Dáss* (*c*).

The case was considered on the 1st of March 1870, by COUCH, C.J., and GIBBS, J.

PER CURIAM:—As this suit is brought in the Mofussil and the parties to it are Hindús, the rule of English law ought not to be applied to it. It must be decided according to Reg. IV. of 1827, Sec. 26, under which the rulings of the Calcutta High Court referred to may properly be followed; and similar decisions have been passed by the late Sadr Diváni Adálat of this Presidency.

(*a*) 6 Calc. W. Rep., Civ. R. 151. (*b*) 8 Calc. W. Rep., Civ. R. 256.
(*c*) 1 Calc. W. Rep., Civ. R. 19.

1870.
March 31.

Special Appeal No. 299 *of* 1869.

SAYAD SAMSUDDI'N PIRJA'DE ..... *Appellant.*

GANPATRA'V JAGANNA'TH *et al.* .....*Respondents.*

Procedure—Misjoinder of Causes of Action.

A suit was brought against six defendants, the cause of action against five of them being unconnected with the cause of action against the sixth.

The Assistant Judge, in whose court the suit was brought, tried one of the causes of action, over which he had jurisdiction, but refused to try the other, over which he had no jurisdiction. In appeal, the District Judge refused to enter into the merits of either, on the ground of the misjoinder of the causes of action.

Held that the District Judge was bound to enter into the merits of the claim, over which the court of first instance had jurisdiction, it not being affected by the error in the misjoinder of the two claims.

THIS was a Special Appeal from the decision of A. Bosanquet, Judge of the District of Thán̤á, in Appeal Suit No. 512 of 1868, amending the decree of A. Lyon, Assistant Judge at Thán̤á, in Original Suit No. 63 of 1868.

The special appeal was heard on the 15th of September 1869, before WARDEN and LLOYD, JJ.

Shántárám Náráyan̤ for the appellant.

Dhirajlál Mathurádás for the respondents.

Cur. adv. vult.

The facts appear from the following judgment, delivered on the 31st of March 1870 :—

Sayad Samsuddín brought this action to recover the mesne profits of a house for a certain period, against six defendants—the defendants Nos. 1 to 5 having formally and without just cause disputed his title, and defendant No. 6, who is the Názar of the Thán̤á District Court, having, it was alleged, illegally exercised his authority to the plaintiff's prejudice.

The case was tried by the Assistant Judge of Thán̤á, who found that the Názar had not acted contrary to law, and,

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therefore, threw out the claim against him. The Assistant Judge also found that the cause of action against the other defendants was distinct from that against the Názar, and should not have been joined together in one suit.

On appeal, the District Judge, considering the action not to be maintainable in the form in which it had been brought, did not enter into its merits.

We are of opinion that the Assistant Judge was right in holding that there was no connection between the cause of action against the Názar and that against the other defendants, and also in declining to enter into the merits of the claim against the five defendants over whom he had no jurisdiction. It also appears to us that there was nothing incorrect in his proceeding to inquire into that portion of the claim which had been properly instituted in his court, and hence that the Judge, when the case came before him in appeal, was bound to enter into the merits of the claim against the Názar, as the error in the misjoinder of the two claims originally would not justify him in dismissing that portion of the claim which had been adjudicated on, merely by reason of such error. We must, therefore, remand the case to the District Court, in order that the appeal between the appellant and the respondent, the Názar, may be tried on its merits.

Decree amended.

Special Appeal No. 490 *of* 1869.

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SATA'PA' valad DAU DONGRE .....*Appellant.*
KARBASA'PA' and RUDRA'PA' minors, by
their guardian, SHARUBA'I .....*Respondents.*

Benámi *Purchase—Purchase in the name of another at a Court's Sale—Civil Procedure Code, Secs.* 259 *and* 260.

The immoveable property of A at a court's sale was purchased by B with the money, and on behalf, of A. B subsequently conveyed the property to C for the benefit of A.

Held that the property could be taken in execution by the creditors of A.

Quære—Whether but for the subsequent conveyance B, under the operation of Secs. 259 and 260 of the Civil Procedure Code, would not have had a good title against the creditors of A.

THIS was a Special Appeal from the decision of S. H. Phillpotts, Acting Senior Assistant Judge at Solápur, in Appeal Suit No. 32 of 1868, reversing the decree of the Munsif of Bársí.

The plaintiff, Satápá, alleged that a certain house, situated in the town of Vairág, was formerly the property of one Apá Shende; that Apá's right, title, and interest therein were sold through the Civil Court and purchased by one Mulú, who sold it to the plaintiff in 1862; and that from that time the plaintiff had had possession of it until it was attached and sold by the defendant in execution of a decree against Apá.

The plaintiff had applied for the removal of the attachment, under Sec. 246 of the Code of Civil Procedure, but his application had been rejected; he, therefore, brought this suit to establish his right to the property.

The defendant pleaded that the purchase by Mulú was on behalf of Apá; and that the sale by Mulú to the plaintiff was a colourable transaction to deceive the creditors of Apá, who had himself supplied the purchase-money to Mulú.

The court of first instance found the sale to Mulú to be *bonâ fide,* and made a decree for the plaintiff. This decree was reversed by the court of regular appeal, which decided in favour of the defendant.

The special appeal was heard before WARDEN and MELVILL, JJ., on the 21st of January 1870.

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Shántárám Náráyan, for the appellant:—The lower court has found that the plaintiff's vendor is a certified purchaser at a court's auction-sale. That gave the purchaser a valid title. The fact that the purchase was fraudulent and made with the money of another man, even though that other might be the judgment-debtor himself, is immaterial, for in Sec. 260 of the Code it is clearly enacted that any suit brought against a certified purchaser (and the same reason applies to his assignee) on the ground that the purchase was made on behalf of another person, though by agreement the name of the certified purchaser was used, *shall* be dismissed. This provision was enforced in the case of *Jokhee Lall* v. *Mussamut Huns Kooer* (*a*).

Pánduráng Balibhadra, for the respondent, cited *Mirza Khyrát Ali* v. *Mirza Syfoolla Khan* (*b*).

Cur. adv. vult.

On the 31st of March 1870 the Court delivered the following judgment:—

The Assistant Judge has found that the property purchased by Mulú at an auction-sale was bought with the judgment-debtor's (Apá's) money, and on behalf of Apá. It has been argued, with reference to Secs. 259 and 260 of the Code of Civil Procedure, that, under these circumstances, the Assistant Judge was wrong in holding that the property continued the property of Apá. There is no doubt that the effect of the above sections was to give Mulú a perfect title as against Apá, and it may be that if Mulú had chosen to retain the property Apá's creditors would have been unable to touch it. But Mulú executed a conveyance of the property; and the Assistant Judge has found in effect that, although the conveyance was in the name of the appellant, Satápá, it was really for the benefit of Apá. In other words, it was a *benámi* sale to Apá, made in consideration of Apá having supplied the purchase-money at the auction-sale. Apá being the real owner, the property is available for his debts, and the court below was right in rejecting Satápá's claim.

Decree affirmed.

(*a*) 10 Calc. W. Rep., Civ. R. 167. (*b*) 8 Calc. W. Rep., Civ. R. 130.

1870.
April 22.

Special Appeal No. 505 *of* 1869.

VINA'YAK JOSHI *et al.* .....*Appellants.*
JANA'RDAN JOSHI *et al.* .....*Respondents.*

Procedure—Regulation Law—Withdrawal from Suit without Leave of Court—Civ. Proc. Code, Sec. 97.

A plaintiff without leave of the Court withdrew from a suit in 1853. He filed a fresh suit on the same cause of action in 1866.

Held that he was not debarred from doing so, as the provisions of Sec. 97 of the Code of Civil Procedure did not apply.

THIS was a Special Appeal from the decision of A. Lyon, Assistant Judge of Thánáá, in Appeal Suit No. 465 of 1867, confirming the decree of the Ṣadr Amín of Ratnágirí.

The plaintiffs sued for the redemption of a piece of land which had been mortgaged to the defendants' ancestors. The defendants pleaded, *inter alia*, that in 1851 the plaintiffs had brought a similar suit against them on the same cause of action, and had withdrawn from it in 1853 without the permission of the court.

The court of first instance, as well as the court of appeal, held that the withdrawal from the old suit was no bar to the present claim.

The Special Appeal was argued on the 31st of January 1870, before WARDEN and MELVILL, JJ.

Páṇḍurang Balibhadra for the special appellants.

Shivshankar Govindrám for the special respondents.

Cur. adv. vult.

April 22. MELVILL, J.:—I do not think that either of the two previous suits is a bar to this claim. The subject-matter of the suit in which the decree No. 50 was passed was not the same; and Vishṇu, who alone prosecuted the appeal in the lower court, was no party to it. In the other suit, which was instituted in 1851, the plaintiff filed a *rázináma*;

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and it is argued that the provisions of Sec. 97 of the Code should be made applicable, and that the plaintiff, having withdrawn without permission, should be held to be precluded from bringing a fresh suit. But under the old Regulations no special permission was required, and the law permitted a plaintiff to withdraw in any case, with license to bring a new suit; and it is impossible to hold that the plaintiff, having availed himself of the liberty which the law allowed him, is now affected by the provisions of Sec. 97 of the Code.

It has been objected in special appeal that the court below erred in hearing the appeal, as the appellants had made an application reciting the substance of a compromise. But it appears that only one of the appellants made any such application, so that the court had no choice but to proceed with the appeal.

I would confirm the decree with costs.

WARDEN, J., concurred.

Decree confirmed with costs.

Special Appeal No. 510 *of* 1869.

Feb 7.

MATHURA'DA'S RANCHODDA'S .....*Appellant.*

KA'LIA' KHUSHA'L.....*Respondent.*

Mortgage—Purchaser at Court's Sale—Priority.

Held that the rule laid down in *Ganpaí Bajáshet* v. *Khandú Chaúgshet* (*a*), "that an unregistered mortgage without possession is not valid against a purchaser with possession," does not apply to a purchaser at a Court's sale *whose instrument of purchase is not registered.*

THIS was a special appeal from the decision of George Ayerst, Acting Assistant Judge of Súrat, in Appeal Suit No. 119 of 1869, reversing the decree of the Ṣadr Amín of Broach.

The plaintiff, Mathurádás Ranchoddás, instituted this suit to recover possession of a house, in accordance with a decree which he had obtained against Bhúliá Harká and Jeṭhá

(*a*) 4 Bom. H. C. Rep., A. C. J. 69.

Harká, who had hypothecated the house to him in 1863. The plaintiff attached the house, but the attachment was removed on the application of the defendant, Káliá Khushál, who claimed to have purchased the house at an auction-sale in execution of a decree in 1866. The plaintiff, accordingly, brought this present suit to establish his right to the house against the defendant. The *san*, or deed of hypothecation, was dated the 20th of September 1863, and the auction-sale took place on the 24th of March 1866.

The defendant, Kália Khushál, answered that the land had not been hypothecated to the plaintiff, and that he, and not the plaintiff or the persons through whom he claimed, was the owner of the property.

The Ṣadr Amín of Broach found that it was proved that the house had belonged to the mortgagors of the plaintiff, and that they had hypothecated it to the plaintiff. The mortgage being established, he held that it was not affected by the subsequent auction-sale, and awarded the claim of the plaintiff.

The defendant appealed to the District Court, and the Acting Assistant Judge found that the house in question was proved to have been hypothecated to the plaintiff by the sons of Harká. He held, however, that as the plaintiff was a mortgagee without possession, and as his mortgage-bond was not registered, his title could not prevail against the title of the defendant, who was a purchaser at an auction-sale and in possession, in accordance with the decision in *Ganpat Bajáshet* v. *Khandú Chaúgshet* (*b*). He, accordingly, reversed the decree of the Ṣadr Amín.

The plaintiff appealed against this decision, and the appeal was heard before COUCH, C.J., and WARDEN, J.

Girdharlál Dayáldás, for the appellant:—The precedent followed in the lower appellate court does not apply. That was the case of a private sale by the mortgagor himself, in which case the vendor sells his entire property, and good title is implied. In an auction-sale, only the right,

(*b*) 4 Bom. H. C. Rep., A. C. J. 69.

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title and interest of the debtor in the property, are sold burdened with any liens created by him before the date of the sale. The plaintiff's mortgage is thus valid against the purchaser.

Dhirajlál Mathurádás for the respondent.

PER CURIAM :—The Court reverses the decree of the lower appellate court. There is an essential difference between a sale by auction in execution of a decree against the judgment-debtor and a private sale by the judgment-debtor. The purchaser at an auction-sale in execution of a decree buys the right, title, and interest of the debtor, whatever that may be, burdened with all valid liens created by him. The precedent followed by the District Judge, therefore, does not apply, as it refers to private sales. This is a Gujarát mortgage, where it is usual for the mortgagor to remain in possession of property hypothecated; such mortgages are called *san*, and are allowed in Gujarát. The question of registration does not arise in this case, as neither the mortgage nor the instrument of sale is registered.

Decree reversed with costs.

Special Appeal No. 529 *of* 1869.

March 31.

RA'MCHANDRA VA'SUDEV ..... *Appellant.*
NA'NA'JI TIMA'JI ..... *Respondent.*

Hindú Law—Adoption—Government Sanction—Watan.

A formal adoption is not invalid because it has not received the sanction of the ruling power, and (where the ruling power does not interfere) an adoption without such sanction entitles the adopted son to succeed to property of the nature of a service *watan*.

THIS was a special appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge, at Kaládgi, in Appeal Suit No. 92 of 1869, reversing the decree of Bábáji Lakshuman, Munsif of Mudebihál.

The plaintiff, Rámchandra, alleged that he was the adopted son of one Vásudev Devji, and, as such, sued to obtain a declaration of his title to a one-anna share in certain *kul-*

karṇi watans; further, to obtain an injunction restraining the first defendant from obstructing him in the enjoyment of a field.

The first defendant stated in his written statement that the adoption had been disallowed by the Government; that the plaintiff, not being a member of the family, could not legally be adopted; and that he never had any enjoyment of the property now claimed.

The Munsif of Mudebihál, finding the fact of adoption proved, awarded the claim; but the appellate court, though concurring with the Munsif in that respect, reversed his decree, on the ground that the approval and sanction of Government were necessary to give validity to the adoption, so as to entitle the adopted person to claim a share in a service *watan*. He recorded the following reasons for arriving at this conclusion:—

"With regard to the third issue, I hold that the approval and sanction of Government were necessary, and that the adoption merely, without such sanction, does not entitle the plaintiff to a share in the *watan*. The land in question is service land, and, therefore, the right of the second defendant as a sharer is not *primâ facie* an absolute one; and although Government may allow his rights to descend to the heirs of his body, it does not follow that it need recognise any right in an adopted son whose adoption it has not sanctioned. Service land is specially exempted from the operation of Bombay Act II. of 1863 by Sec. I., cl. 2, the reason of course being that the tenure of such lands is subject to the pleasure of Government. The nature of this tenure is more particularly declared in para. 3 of cl. 3 of Sec. II. of Bombay Act VII. of 1863, which enacts that 'lands held for service shall be resumable or continuable under such general rules as Government may think proper from time to time to lay down.' This Act does not apply to this part of the Presidency, it is true, but this and Act II. are analogous Acts, and service lands are the same everywhere.

"In *Bhásker Buchájee* v. *Nárro Ragoonáth* (*vide* Reports of Selected Cases of the Ṣadr Diwáni Adálat, Bombay, 1820-40,

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p. 25) the Shástris stated that for dependants of Government holding *saranjáms* &c. the permission of Government was necessary under the Peshwá's government to the validity of an adoption—by which is meant, not that an adoption made with due forms and ceremonies can be set aside, but that, as regards property held in dependence on Government, the adoption is invalid unless made with the permission of Government;* and the rule printed at p. 31 of the Revenue Circular Orders of the Bombay Presidency (edn. of 1860) shows that our own Government has not abandoned its rights in this respect.

"I think, therefore, it is quite evident that the plaintiff's adoption by the second defendant without the sanction of Government does not necessarily give the plaintiff a right to a share in the *watan*, and the necessity for Government sanction has been in a measure acknowledged in this case by the second defendant's petitioning Government for its sanction to his adoption of the plaintiff.

"If the plaintiff is prepared to show that the Government could not withhold its sanction, or that he is entitled to a share in the *watan*, notwithstanding that Government refuses its sanction, he should sue Government. He cannot be allowed to bring a suit in a court, in which Government could not be joined as a party, against his own adoptive father and another sharer, and thereby obtain a declaratory decree establishing his right to property which is held only in dependence on Government, and in the disposal of which, of course, Government must be consulted in the first place."

The special appeal was argued on the 23rd of March 1870, before WARDEN and LLOYD, JJ.

* NOTE BY THE REPORTER.—Mr. Naylor seems to have misunderstood this case: see the conclusion: where the Sadr Diváni Adálat found it established on the evidence, and also on the exposition of its law officers, that neither length of time after the decease of the adoptive widow's husband, nor the adoption having taken place at other than the place of residence of the parties, nor want of the permission of the ruling authorities, were sufficient grounds for setting aside an adoption once made with sufficient ceremonies.

The Honorable *A. R. Scoble* (Acting Advocate General) (with him *Dhirajlál Mathurádás*), cited the following authorities to show that the sanction of Government was not necessary to the validity of an adoption, even where by virtue of such adoption the adopted person succeeded to lands held on service tenure:—*Bhásker Buchájee* v. *Nárro Ragoonáth* (*a*); *Virbudru Hurrybudru* v. *Báee Ránee* (*b*); *Trimbak Báji Joshi* v. *Náráyaṇ Vináyak Joshi* (*c*); *Vishrám Báboorow* v. *Náráinrow Kásee* (*d*); *Chenbasawá* v. *Pampangowda* (*e*); *Rakhmábái* v. *Rádhábái* (*f*). Act XI. of 1843 and Bombay Acts II. and VII. of 1863 were also referred to.

Anstey (with him *Shántárám Náráyaṇ*), for the respondent:—The Ṣadr Adálat reports quoted are vague and unsatisfactory, and the cases cited therefrom do not apply. Under the Hindú law where the consent of the supreme authority is wanting, an adoption was not held good. The Hindú jurisprudence and the custom of Government coincide. It has been frequently held by the Civil Courts that the office of a service-*watan*-holder is a life-interest only, and that the Government has an option to select a proper person to whom to continue it; and it is, therefore, impossible to conceive how a successor could be appointed without consulting the Government. The consent of Government is necessary to render an adoption valid in the case of *saranjámdárs* and of *parganá watandárs*; and the same rule applies to this case. The interests of Government demand that Government should be made a party to the suit.

PER CURIAM:—This is an action brought by Rámchandra Vásudev to obtain a declaration of his title as the adopted son of Vásudev Devji to a one-anna share in a *kulkarṇi watan*, and also an injunction to prevent Nánáji Timáji from obstructing him in the possession of a field which, he alleged, he held by virtue of his share in the said *watan*.

(*a*) Cases Decided by S. D. A. 1820-1840, p. 25.
(*b*) Morris's Selected Decisions, Part II., p. 1.
(*c*) 3 Morris's S. D. A. Rep., p. 19. (*d*) 4 Ibid. 26.
(*e*) S. A. No. 655 of 1864, decided by *Westropp* and *Tucker*, JJ., in 1866.
(*f*) 5 Bom. II. C. Rep., A. C. J. 181.

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The Munsif of Mudebihál, who tried the case, awarded in favour of the plaintiff, on the ground that the adoption was fully proved.

On appeal, the Senior Assistant Judge of Kaládgi, though finding that the adoption was satisfactorily proved to have been performed with all the forms and ceremonies requisite to make it valid, reversed the decree of the Munsif, because the sanction of Government, which had not been accorded, was, he considered, necessary to entitle the plaintiff to a share in the *watan*; and the case comes before us to decide this question only, namely, whether the fact of the adoption not having been made under the sanction of Government is a bar to the admission of the plaintiff's claim; for the objection filed by the respondent regarding the adoption itself has been withdrawn in the course of the argument.

After consulting the authorities that have been quoted by the learned counsel on both sides, we are of opinion that a formal adoption should not be set aside because it has not received the sanction of the ruling power, and that there are no good grounds for the argument that a distinction should be made when the property to be inherited is of the nature of a *watan*; and, as an adopted son inherits all the rights to which a son would be entitled, the decree of the Munsif must be upheld.

It has been urged that Government should be made a defendant; but we consider that the result of the suit will not affect the interests of Government, and that we should, therefore, confine ourselves to the point at issue between the parties who are before the court.

Decree of Appellate Court reversed, and the decree of the Munsif confirmed.

1870
April 1.

Special Appeal No. 70 of 1870.

DA'MODHAR BA'PU'JI PA'CHA'PURKAR .....*Appellant.*
ZINGA' kom KANDLIKA' .....*Respondent.*

Certificate of Administration, Order for—Order reversed—Unauthorised Payments.

Where a widow obtained an order for a certificate of administration to the estate of her deceased husband, which order was, however, reversed on appeal before the certificate was granted:

It was held that payments made to the widow before the order was reversed were unauthorised.

THIS was a special appeal from the decision of R. F. Mactier, Judge of the district of Sátárá, in Appeal Suit No. 274 of 1869, confirming the decree of the Subordinate Judge of Sátárá.

The facts of the case are briefly these :—In the month of January 1866 one Náro Bápúji Páchápurkar died leaving a brother, the present plaintiff, Dámodhar, and a widow named Jánkibái. The latter applied to the District Judge of Sátárá for a certificate of administration to the estate of her husband, and in November 1866 an order was passed directing the grant of such certificate. Under the authority of this order Jánkibái at once set about collecting her husband's debts, and many debtors, among whom was the defendant, Zingá, paid her the debts due to the deceased, although no certificate had in fact been granted to her. In the mean while, an appeal having been preferred to the High Court, the order of the District Judge in favour of Jánkibái was annulled, and a certificate to administer his brother's estate was issued to Dámodhar, on the 20th of December 1867.

Upon the strength of this certificate Dámodhar sued the defendant, Zingá, to recover a sum of money due on a mortgage bond. Zingá admitted the execution of the bond, but pleaded that she had paid the debt to Jánkibái, who was for the time being the sole manager of the deceased Náro's estate, and had obtained a receipt from her.

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The Subordinate Judge of Sátárá threw out the claim, and the District Judge upheld his decision.

The special appeal was argued before GIBBS and LLOYD, JJ.

Shántárám Náráyaṇ, for the special appellant:—The District Judge was wrong in holding that a payment made to a person who had only obtained an order for the grant of a certificate of administration was binding against the party who actually got such a certificate in supersession of the order. This is opposed to the ruling of the High Court in *Dámodhar Bápúji* v. *Rávji* (22nd December 1869).

There was no appearance for the special respondent.

PER CURIAM:—This question has been already before the High Court. Náro's widow had obtained an order from the District Judge for a certificate of administration to the estate, but before the certificate was granted the High Court interfered. Náro's widow, however, set about collecting debts, and some debtors paid her, among them was Zingá. As she paid to a person not legally authorised, she must pay it again; and we must reverse the District and the Subordinate Judges' decrees, and award in favour of the original plaintiff. (Miscellaneous Special Application *In re Dámodhar Bápúji* v. *Rávji*, * per COUCH, C.J., WARDEN and GIBBS, JJ.)

Decrees reversed, and plaintiff's claim awarded.

* NOTE BY THE REPORTER.—In this case the facts were similar to the present one. The defendant, Rávji, was another of the debtors who had paid to Jánkibái before the order of the District Judge had been superseded by a grant of the certificate to Dámodhar. Although the claim against him, being on a simple bond for less than five hundred rupees, was cognisable by a Court of Small Causes, and, therefore, not specially appealable, the High Court reversed the order of the District Judge in favour of Rávji, in the exercise of its extraordinary jurisdiction, as it was of opinion that, as Jánkibái had not been furnished with a certificate, Rávji was not justified in paying the money to her.

Special Appeal No. 347 *of* 1869.

1870.
April 5.

SAKHA'RA'M SHRI'DHAR GADKARI .....*Appellant.*
THE CHAIRMAN OF THE MUNICIPALITY OF KALYA'N *et al.* .....*Defendants.*

Municipal Commissioner—Illegal Order—Rules framed by Government—Act XXVI. of 1850.

Where a party is injured by an order of Municipal Commissioners under Act XXVI. of 1850, issued in respect of a subject within their jurisdiction, he is debarred from bringing a suit in the Civil Courts to annul such order until he has exhausted the remedies afforded to him by the rules framed by Government in accordance with the provisions of the Act.

THIS was a special appeal from the decision of A. Bosanquet, Acting Judge of the Thạ́ná district, in Appeal Suit No. 434 of 1868, confirming the decree of A. Lyon, the Assistant Judge.

This suit was brought by the plaintiff to cause two notices, issued by the defendants upon him for the removal of his house and *o̤tá,* to be annulled, on the ground that the notices were illegal, and beyond the authority of the defendants to issue; and to establish the plaintiff's proprietary right to his said house and *o̤tá.*

The defendants answered that the notices were authorised by clauses 2 and 3 of Sec. 5 of the rules of the municipality; and that the land belonged to the municipality, and not to the plaintiff.

The Assistant Judge gave judgment for the defendants, holding that the plaintiff was debarred from bringing a suit in the Civil Court by reason of his not having availed himself of the remedy provided by the rules of the municipality.

Both the notices complained of were issued on the 13th of January 1868, requiring the plaintiff to remove an *o̤tá* and a part of a new building which encroached upon the public road, being beyond the line and level of the road. On the 15th of January 1868 the plaintiff appealed against the notices to the Collector, who, on the 17th of January 1868, called for the papers, and stayed execution of the notices pending the decision of the case. Before any final order was passed

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SAKHA'RA'M S. GADKARI *v.* KALYA'N MUNICIPALITY *et al.*

by the Collector, the plaintiff, on the 22nd of January 1868 filed his plaint in the present suit.

By Sec. 6 of the rules framed by Government for the guidance of municipalities under Act XXVI. of 1850, it is provided (cl. 1) that "All complaints against the municipality shall be addressed in the first instance to the municipal commissioners."

Cl. 2. "Persons dissatisfied with the final decision of the commissioners may prefer an appeal to the Collector and Magistrate, or Assistant Collector and Magistrate in charge, of the táluká, who may dismiss the appeal if he considers it groundless; but if he considers the appeal well grounded it will be his duty, without authoritatively interfering with the proceedings of the commissioners, to endeavour, in communication with them, to cause redress to be afforded to the complainant."

Cl. 3. "If he considers that the municipality has exceeded the powers with which it is vested by law, he shall pass such orders in the matter of the appeal as will afford redress to the complainant without unnecessarily degrading the authority of the municipal commissioners."

Cl. 4. "If he entertains a doubt as to the correctness or otherwise of the proceedings which form the subject of appeal; in that case, the matter shall be referred by him for the decision of the Police Commissioner, whose decision shall be final."

The Assistant Judge said that these rules had the force of law, and that their effect was to bar the cognisance of suits against the municipality until the provisions of these sections were complied with; that the Collector's order on the plaintiff's petition was not a final order; and that the plaint was brought in so short a time after the date of the petition that no time was allowed to the Collector to make a final order. He held, accordingly, that, as the plaintiff had not resorted to the special remedy afforded by the rules, the cognisance of the suit was barred within the meaning of Sec. 1 of the Civil Procedure Code. He found, on the other issue, that

the land belonged to the plaintiff, but that the *oṭá* was an encroachment, and that with regard to it the commissioners were authorised to issue the notices. He gave judgment for the defendants.

The plaintiff appealed to A. Bosanquet, Acting Judge of the District Court, who confirmed the Assistant Judge's decree with costs, holding that the plaintiff was debarred from bringing a civil suit against the municipality until he had adopted the means of redress provided for by the rules.

The plaintiff appealed from this decision of the District Court. The appeal was heard by COUCH, C.J., and LLOYD, J., on the 5th of October 1869.

Shántárám Náráyaṇ, for the appellant:—If the reasoning of the lower court is correct, the plaintiff is virtually debarred from ever seeking the assistance of the Civil Courts, as cl. 4 of Sec. VI. makes the orders of the Police Commissioner final. These provisions can only be meant to point out a departmental mode of redress. The jurisdiction of the regular courts is not taken away by express words, and if this is not done the mere provision of another special remedy does not suffice to exclude their jurisdiction. If the plaintiff waits till his case is finally disposed of, his cause of action may become time-barred. The section, I submit, provides a concurrent remedy only, of which the plaintiff is not bound to avail himself.

Dhirajlál Mathurádás, for the respondents, cited *The Collector of Patna* v. *Romanath Tagore* (*a*), and Regular Appeal No. 11 of 1865, *Chimâ* v. *The Magistrate of Khándesh*.

Cur. adv. vult.

5th April 1870. COUCH, C.J.:—The question is whether the plaintiff could institute this action in the Civil Court. The rules framed under the Municipal Act provide that all complaints against the municipality must be first made to

(*a*) 7 Calc. W. Rep., Civ. R. 191.

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the municipal commissioners, from whose orders an appeal is allowed to the Collector, and in cases of doubt the Collector may refer to the Police Commissioner for orders, and the orders of the Police Commissioner are declared to be final. The object of these rules seems to be a very proper one—to provide a mode of special redress in questions which must arise in the exercise by the municipal commissioners of the powers conferred upon them by the Act, which would be sufficient for the purposes of justice in the great majority of cases, and would avoid all unnecessary degradation of the authority of the commissioners. Whatever, however, be their object, we must consider what is the law, and we must follow that and decide accordingly. The plaintiff may have a rightful claim, but he cannot at present enforce it by civil suit, as the rules apply in this case. We have now not to consider whether the municipality had power to issue the notices, and whether they issued them in the *bonâ fide* belief that there was an encroachment, for the lower courts have found that there was an encroachment; and there is nothing to show want of *bona fides* or irregularity in issuing the notices, as the notices there were properly issued: and as the plaintiff had not followed the course prescribed by the rules to obtain redress it was not competent to him to bring this suit. It does not follow that if the plaintiff does not get redress in the way prescribed by the rules he will not succeed in an action which he will then institute. We are, however, bound by the authority of the rules, and must satisfy ourselves that the procedure prescribed by the rules fails to give the proper redress before allowing an action to be brought. This is consistent with the judgment of *Tucker*, J., in *Chimá* v. *The Magistrate of Khándesh*. We, accordingly, confirm the decision of the lower court.

Decree affirmed with costs.

Miscellaneous Appeal No. 5 of 1869.

1870. April 13.

GOVIND HARI WA'LEKAR .....*Appellant.*
SHI'DRA'M bin SHIDMURTI .....*Respondent.*

Procedure—Principal Civil Court of District—Civ. Proc. Code, Secs. 285, 286—Bombay Civil Courts Act, 1869 (XIV. of 1869), Sec. 19.

When an Assistant Judge is invested with all the powers of a District Judge within any part of the district of such Judge, the Court of the Assistant Judge must be considered, equally with the Court of the District Judge, the principal Civil Court of original jurisdiction, and a decree sent for execution in such part of the district is properly executed by or under the directions of such Assistant Judge.

The functions of the Court executing a decree are judicial, and not merely ministerial.

THIS was a miscellaneous appeal from the decision of R. White, Judge of the district of Puṇá.

The facts sufficiently appear from the judgment.

The appeal was argued on the 30th of March 1870, before GIBBS and LLOYD, JJ.

Shántárám Náráyaṇ for the appellant.

Anstey (with him *Nánábhái Haridás*), for the respondent.

Cur. adv. vult.

April 13th. GIBBS, J.:—The facts of this case are as follows :—

A decree was passed on the Original side of this court against one Shidrám bin Shidmurti Ainápúre, an inhabitant of Bombay, and also of the Soláپur collectorate. The plaintiff, Govind Wálekar, not being able to execute his decree in Bombay, applied, under Sec. 285 of the Civil Procedure Code, for, and obtained, a certificate from the Original side of this court, which, with a copy of the decree, he presented in the District Court at Puṇá, deeming that to be "the principal Civil Court of original jurisdiction in the district" in which he wished his decree to be executed. On his application to that court to attach certain moveable and immoveable property belonging to the defendant, the District Judge (Mr.

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White) issued the customary order to his Názar, but on a further application, forwarded the application and the order to the Munsif of Bársí, by whom the attachment was made.

Subsequently, on an application by the defendant, the District Judge reviewed his order, and set it aside, on the ground that he had no jurisdiction in the matter. His order runs thus :—

"When I gave the order for execution of the decree, I was not aware that the Acting Assistant Judge at Soláp̣ur had, previously to the receipt of the copy of the decree and certificate, been invested, under Sec. 19 of the Bombay Civil Courts Act, 1869, with all the powers of a District Judge within that part of the Puṇá district forming the sub-collectorate of Soláp̣ur.

"The section in question provides that the jurisdiction of an Assistant Judge so invested shall *pro tanto* exclude the jurisdiction of the District Judge from within the said limits.

"I had, therefore, no jurisdiction in the matter of the execution of this decree in the limits of the Soláp̣ur sub-collectorate.

"It is true that Sec. 286 of the Code of Civil Procedure provides that a decree to be executed in another district must be sent to the principal Civil Court of original jurisdiction in the district in which the applicant may wish the decree to be executed, and that the Bombay Civil Courts Act, 1869, enacts that there shall be in each zillá or district a district court which shall be *the* principal court of original civil jurisdiction in the district within the meaning of the Code of Civil Procedure : from which said provision and enactment it might be inferred that it was not contemplated that there should ever be two principal courts of original civil jurisdiction in the same district, which is the case in a district where there is, besides the District Judge, an Assistant Judge invested with all the powers of a District Judge, in a portion of the district, from which portion also the exercise of the jurisdiction of the District Judge is *pro tanto* excluded.

"But such an inference would be opposed to the legal maxim that when the provisions of two statutes are manifestly repugnant the earlier enactment will be impliedly modified or repealed—a maxim which may I presume, be applied to the case of the provisions of the same statute being manifestly repugnant, as Secs. 3, 5, and 7 of the Bombay Civil Courts Act, 1869, appear to be with Sec. 19 of that Act.

"The decree, under this view of the matter, should have been transmitted to and executed by the Assistant Judge at Solápur; and hence the proceedings taken in execution of the decree by this court must be held to be invalid on account of want of jurisdiction."

Against this order the present appeal is admitted, and the court has to decide the effect of Secs. 5, 7, 19, and 20 of the Bombay Civil Courts Act of 1869.

The 5th section declares that there shall be in each district a District Court presided over by a Judge to be called the District Judge. By the 7th section this District Court is declared to be the principal court of original civil jurisdiction in the district within the meaning of the Code of Civil Procedure.

By Sec. 14, Government may appoint one or more Assistants to the Judge, and by Sec. 19 Government may invest an Assistant Judge with all or any powers of the District Judge within a particular part of a district; and it enacts that the jurisdiction of an Assistant Judge so invested shall *pro tanto* exclude the jurisdiction of the District Judge from within the said limits. By Sec. 20 the Assistant Judge is to use the seal of the District Judge.

By the 286th section of Act VIII. of 1859 the application for execution is to be made in the principal civil court of original jurisdiction in the district.

By notification in the *Government Gazette*, the Governor in Council invested one of the Assistants to the Judge of Puṇá with the full powers of a District Judge, to be exercised within that portion of the Puṇá district which includes the

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sub-collectorate of Solápur, and directed him to hold his court at Solápur. The court and local jurisdiction of the Munsif of Bársí forms part of this portion of the district.

Such being the case, it follows that the District Judge, having lost his jurisdiction within that portion, could not issue an order to the Munsif of Bársí to attach property situated within his (the Munsif's) jurisdiction.

Now it is perfectly clear to me that the Act (Bombay Civil Courts Act) nowhere intended that there should be more than one court of principal original civil jurisdiction in a district, and also that the only jurisdiction the District Judge can exercise is that conferred on the district court. He can, therefore, exercise those powers only in the portion of the Puṇá district which is not within the sub-collectorate of Solápur, within which the jurisdictiou of the principal Civil Court of original jurisdiction is to be carried out by the Assistant Judge, in whom all the powers of the District Judge in that portion have been vested by Government; and his court at Solápur must be considered, equally with that at Puṇá, the principal Civil Court of original jurisdiction. In fact that there are two officers, the District Judge and his Assistant, who between them exercise the jurisdiction of a District Judge in the entire Puṇá district, namely, the District Judge in the Puṇá, and the Assistant Judge in the Solápur, collectorate—the one having no power within the limits of the other, but the court, the powers of which they carry out, being one.

I am, therefore, of opinion that in presenting the High Court's decree for execution in the Puṇá district the plaintiff was not wrong in presenting it at Puṇá, but that, the plaintiff having so done, it was the Judge's duty, when he found the property situated in the Solápur sub-collectorate, to have sent the papers to the Assistant Judge, the officer who in that portion of his district alone could exercise the jurisdiction of a District Judge. It is clear to me, therefore, that the District Judge, Mr. White, was acting *ultra vires* in passing the order

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he did for the execution of that decree; and I, therefore, consider the order now appealed against so far correct.

It has been urged upon the court by Mr. Shántárám Náráyaṇ that in directing the attachment of the property by the Munsif of Bársí the District Judge was only acting ministerially, and, therefore, as it did not form part of his jurisdiction as District Judge, it was not affected by the Assistant Judge's appointment. This argument has been met by Mr. Anstey, for the opposite side, who showed that the provisions of Secs. 286 to 296 were clearly of a judicial character, and, by Sec. 294, open to an appeal.

The proper order in this case, as it appears to me, is to confirm the District Judge's decision, and to direct the papers to be returned to that officer with instructions to forward them to the Assistant with full powers at Solápur for execution.

Costs of this appeal to be borne by the appellant.

LLOYD, J. :—I concur.

Regular Appeal No. 4 *of* 1869.

Jan. 19.

RA'MCHANDRA NARSIṆHA MAHA'JAN .....*Appellant.*
THE COLLECTOR OF RATNA'GIRI'.....*Respondent.*

Khotí *Tenure—Assessment—Liability of* Khot *of Attached Village to Assessment in respect of lands held by him—Bombay Act I. of* 1865, *Secs.* 3 *and* 38.

Held that a *khot* is liable to be assessed for *khotí* profits in respect of land in his private occupation during the time that the *khotí* village is under attachment by Government.

Quære—whether a *khot* in respect of such lands is a tenant within the meaning of Sec. II., cl. (*l*) of Bombay Act I. of 1865, and whether the powers in Sec. 38 of that Act apply to such lands.

THIS was an appeal from the decision of Baron De H. Larpent, District Judge of Ratnágirí, in Original Suit No. 13 of 1868.

The *khotí* village of Kozar was in 1865 attached by Government, in consequence of the refusal of the *khots* to enter into

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the usual *kabuláyat*. When the village was attached, the Revenue Survey had been introduced into it. The plaintiff, Rámchandra Narsinha, was one of the *khoti* co-sharers in the village, and, as such, had lands in his private occupation during the period the village was under attachment. The lands so occupied by the plaintiff were assessed for revenue and local fund purposes during the attachment, and the amount of such assessment was levied from the plaintiff by the defendant.

To recover the *khoti* profits in respect of such land, and the assessment for local fund purposes paid by the plaintiff for the year 1866, he brought the present suit.

The defendant in his answer alleged (I.) that the plaintiff had entered into an agreement to pay *khoti* profits, and (II.) that, independent of such agreement, the plaintiff was liable to pay the amount of *khoti* profits, and of the assessment for local fund purposes, by custom and law.

The agreement upon which the defendant relied was signed by the plaintiff's brother, the *kabuláyatdár* of the previous year, and it was alleged that the plaintiff and his brother were members of an undivided family, and that the agreement was entered into by the plaintiff's brother as manager acting on behalf of the whole family, and as such was binding on the plaintiff.

The plaintiff denied the allegation of the family being joint, and that he was bound by the agreement; and also stated that it was customary for the Government to respect and act upon during the first year of attachment any agreement entered into between the *khots* themselves.

It appeared from the evidence that the land actually occupied by the plaintiff had been assessed under the Revenue Survey Act.

The District Judge found that the agreement of the previous year, passed by one brother as *kabuláyatdár* of the year, could not bind the plaintiff, as these *kabuláyats* were passed by the different members of the family in turn, and *kabu-*

lágatdárs did not act as managers. As to the liability, by custom, of a *khot* to pay *khoti* profits on land in his private occupation, the Judge found that in unsurveyed villages when under attachment a *khot* was liable, like any ordinary cultivator, to pay *khoti* profits on land in his private occupation. "During attachment," he said, "*khoti* rights are in abeyance, and each sharer is tenant to Government, which is in the position of the managing *khot* of the village during attachment, as he is to co-sharers when there is no attachment. Such land in private occupation is not *dhárá*. Bombay Act I. of 1865, Sec. 38, made no change in the old customary liability. It only fixed the amount to be levied as *khoti* profits in excess of Government assessment proper." The Judge, accordingly, held that the plaintiff was liable by custom to pay the *khoti* profits on land in his private occupation, and the amount of the local fund due in respect of his land under Act I. of 1865. The Judge found that, although it was usual for the Government to respect *khots'* agreements during the first year of attachment, no settled agreement between the *khots* was proved.

The appeal was argued before COUCH, C.J., and MELVILL, J.

Vishvanáth Náráyan Mandlik, for the appellant:—Sec. 38 of Act I. of 1865 legalises the levy of *khoti* profits; it applies to those who are tenants as defined by the Act, and fixes the demands of the *khot* on the tenants who hold from him. The *khot's* interest is hereditary and proprietary, and he does not cease to be a *khot* during a temporary attachment, or become a tenant by reason of such attachment.

[COUCH, C.J.:—The *khot*, as regards lands in his private occupation, may be tenant to himself *quâ khot*, or he may be tenant of the coparcenary, or of the Government which stands in its place.]

If a *khot* can create a *dhárá* in his village to last as long as the *khot* lasts, the *khot's* interest must be of a superior character to that of a *dhárekari*, and the *khot* cannot be looked upon as a tenant under the Act.

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The *khot* has a right to alienate, and his occupation of his private lands may be looked upon as an alienation.

The evidence shows that sharers never pay *khoti* profits among themselves, and as this is a suit for *khoti* profits levied during the first year of attachment, when by custom the *khot's* arrangements are continued by Government, the plaintiff has a right to recover.

Scoble (with him *Dhirajlál Mathurádás*), for the respondent:—The judgment in the case of *Tajubái* v. *The Collector of Kulábá* (*a*) shows the position of the *khot* to be that of a farmer of land revenue with certain rights and privileges. His interest as farmer is dependent for its continuance on his passing a *kabuláyat* to Government. When he fails to contract, and Government steps in, the *khot* falls into the position of a ryot, and he must pay the one-half or one-third of profits for the land cultivated by him. During attachment he is not a *khot*, except so far as he has a right to be restored to the management on passing a *kabuláyat*. *Khoti* profits are simply remuneration allowed for the risk and trouble of collecting the revenue. They are not due to the *khot* when Government farms its own revenue. A *khot* has never been recognised as an owner of land. He is entitled only by reason of his agreement, and failing to pass that, he is liable to assessment and profits, like any ordinary ryot.

Cur. adv. vult.

19th January. COUCH, C.J.:—The question raised in this appeal is whether the plaintiff, as a *khot* of the village of Kozar, is liable to be assessed for the *khoti* profits on *khoti* land in his private occupation during the time the village is under attachment by Government. In the case of *Tajubái* v. *The Collector of Kulábá* (*suprà*), it was found as one of the material facts with regard to the *khoti* tenure, that "as the *khot* settles with Government for assessment of the village as a whole, or for his share in it, it follows that he may let out for cultivation, or himself cultivate, without making any additional payment to Government on that

(*a*) 3 Bom. H. C. Rep., A. C. J. 132.

account, any waste or uncultivated land of the village. If, however, he fails to contract by *kabuláyat* for the fixed assessment for any year, and the duty of realizing the revenue thus devolves on Government, he pays the half or the third (as may be customary) of the produce of land so cultivated by him as any ordinary ryot." And in the judgment of the majority of the Judges in that case it is said: "An incident which seems conclusively to show that a *khot* possesses, with reference to the lands within his *khoti*, no rights which are not dependent on the continued exercise by him of his functions as a farmer of the revenue, is the fact found by the court below, that although a *khot* while in office may dispose of available land for his own benefit, or cultivate it himself, he becomes liable in the latter case for the full amount of assessment as an ordinary cultivator whenever he ceases to discharge the duties of his office. The right to cultivate such waste or other lands as may be at the *khot's* disposal, or to give them out in cultivation under such terms as may be most to his advantage, must, consequently, be viewed as the recognised mode of his remuneration for the services rendered." This fact, which was found in the case quoted, does not appear to have been questioned in the present case; and we concur in the view taken in the above passage of a *khot's* rights with reference to lands within his *khoti*. Nor does this view appear to be at variance with the judgment of Mr. Justice Tucker, the dissentient Judge. A *khot* cannot, by himself cultivating the land, acquire higher title to it than he has to the khotship, or a title independent of it. His occupation of the land without making any additional payment is really part of the fruits of the khotship, and is only provisional upon its continuance. Nor, when there are several sharers in the khotship, can they, by each taking a portion of land into his separate occupation, alter the nature of their right. It follows, then, that, whether the khotship be determined or only suspended by the attachment, the right to cultivate without making any additional payment to Government, which is derived from and dependent upon the khotship, must also be determined or suspended. And we are unable to see any ground for the right claimed by the appellant.

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The Bombay Act I. of 1865 was relied upon for him, but that does not appear to have made any difference in his rights. It may be that a *khot* is not, with reference to lands in his own occupation, a tenant within the definition (*l*) in Sec. 3, and probably the power in Sec. 38 does not extend to such land. There is no necessity that it should. The exercise of the power is not imperative, and if the rate of *khot's* profits has not been fixed for the lands in the *khot's* own occupation, it must be what was customary before the Survey, and may be realized under Reg. XVII. of 1827.

As to the objection that there was an agreement entered into by the *khot*, which ought to have been respected for the first year, we agree with the court below in thinking that it was not proved that there was such an agreement. The witnesses relied on for this were Nos. 38, 51, 52. No. 38 is the brother of the appellant, and one of the sharers in this khotship, and Nos. 51 and 52 are both *khots*. And all they say is that sharers never pay each other the profits on land in their private occupation. This may well be without there being any agreement, the land being occupied in such proportion that the result is the same as if each paid the profit, and it was then divided between them. We, therefore, think no ground has been shown for altering the decree of the court below, and that it should be confirmed with costs.

Decree confirmed with costs.

Feb. 2.

Special Appeal No. 514 *of* 1869.

NA'NA'BHA'I VALLABDHA'S .....*Appellant.*

NA'THA'BHA'I HARIBHA'I'.....*Respondent.*

Partition—Suit not including whole of Claim of Plaintiff—Civ. Proc. Code, Sec. 7.

A member of an undivided family cannot sue his co-sharers for his share in a single undivided field, portion of the family property. He must sue for a general partition of all the property liable to partition.

THIS was a special appeal from the decision of M. H. Scott, Acting Assistant Judge at Ahmedábád, in Appeal Suit No. 72 of 1869, reversing the decree of the Munsif of Neriad.

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The plaintiff, Nánábhái Vallabhdás, sued the respondent above named and six other defendants for possession of an eighth-share of an undivided ancestral field at Neriad, and for mesne profits thereof for three years.

Náthábhái Haribhái answered that the suit did not include the whole of the claim, and that the plaintiff, as he was a member of the family to which the defendants belonged; and was in possession of other ancestral land in which he had not allowed the defendants their proper shares, could not sue for his share in the field in question except in a general partition suit.

The other defendants replied that they did not obstruct the plaintiff's claim, and were not liable to be sued, as their shares had been either mortgaged to the defendant, Náthábhái, or were managed by him on their account.

The Munsif of Neriad held that the plaintiff could in this suit claim partition of his share in the field sued for. As to the objection that the present suit did not include the whole claim, the Munsif held that it could not affect the present suit; but in case the plaintiff brought another suit for his share in other land upon this same title, the objection might be urged with effect, as he would be held to have relinquished his claim to all other land by suing for his portion in the land which was the subject of the suit. He, accordingly, awarded possession of $\frac{2}{3}$ths of a *bighá* and $2\frac{1}{2}$ *vassás* in the field, and also a part of the mesne profits claimed.

Náthábhái appealed to the District Court, and the Acting Assistant Judge, in reversing the decree of the Munsif, gave the following judgment:—

"The agreement No. 7, after reciting the whole of the property of the plaintiff and defendants as coheirs, states that when partition is required by any or all of the sharers reference shall be made to arbitration, and the limits of the respective shares shall be then determined. The whole land is 24 *bighás* in four parcels, the sharers in each parcel being the same. The plaintiff sues for his share in one parcel of 7 *bighás* only, and makes mention of other property. In a supplementary and subsequent writing he says that, having ceased to be interested in the other parcels, he does not sue for his

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share in them. No *panchâyatnámá* or award of arbitrators, or proof of partition, is adduced, nor does the plaintiff show how or when partition took place. Even if partition of one parcel of 13 *bighás*, as to which proof was not given below, be admitted, there remain 11 *bighás* undivided, and the plaintiff even then does not sue for his whole claim in suing for his share out of 7 *bighás* only. The agreement No. 7 seems to contemplate a single partition, and not that each parcel may be apportioned at a different date if demanded by any sharer. The plaintiff does not show that only 7 *bighás* remain undivided, nor does he show that he has no interest whatever in the remainder of the property not sued for by him."

He, accordingly, reversed the Munsif's decree.

The plaintiff appealed from this decision, and the appeal was argued before COUCH, C.J., and MELVILL, J.

Nánábhái Haridás, for the appellant:—The plaintiff's share in the field sued for is admitted; and as to the objection that the present claim does not include the whole of the undivided property, the plaintiff says he lays no claim to any other property, and that he has ceased to be interested in any other property. The allegation of the defendant is that the plaintiff is already in possession of other lands in which the defendants have not shared; but there is no evidence to show that the plaintiff has any such property, and the plaintiff distinctly says that the property alluded to by the defendant is not in his possession, but with strangers. If this statement were not true, and the plaintiff was in possession of other undivided property, the court had the power of compelling the plaintiff to bring his own property into hotchpot in which defendants could show that they were interested. In a recent case, Special Appeal No. 339, this same point was raised. In that case the plaintiff stated in his plaint that he would sue for the remaining portion of the property not included in the suit; in this case the plaintiff expressly says he has ceased to be interested in any other property.

[COUCH, C.J.:—But this is a partition suit, which that was not.]

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Dhirajlál Mathurádás, for the respondent :—In Special Appeal No. 112 of 1869, decided on the 24th of June 1869, it was held that in partition suits the plaintiff must sue for a partition of the whole property. The court in that case did not follow several old precedents which allowed amendment of the plaint so far as to permit the plaintiff to add his willingness to throw what he held of the undivided land into hotchpot on the ground that it was shown in that case that undivided property other than the subject-matter of the suit was held by both parties. The court, accordingly, rejected the claim, and, following the precedent of Special Appeal No. 95 of 1868, permission was given to bring a fresh suit for a share of the whole undivided property. The present case is entirely governed by the decision of the court in the abovementioned appeal. There was a previous suit against the present plaintiff by the present defendant, Náthábhái, of a similar sort, for a partial partition ; that claim was disallowed. The plaintiff in the supplementary plaint does not expressly relinquish all right to other property ; he simply says he has ceased to be interested in the other parcels.

COUCH, C.J.:—We think that the District Judge was right in rejecting the claim. It is plain that some other land than the subject of the suit was admitted in the agreement document No. 7 to be the subject of partition ; and now the plaintiff claims a share in a portion of the lands which have yet to be divided, according to the plaintiff's own admission evidenced by the document. Under the circumstances, it is incumbent upon him to show that all the other lands except the parcel sued for have been divided, or to show the reason why they have not been divided. It seems that the plaintiff sues for a share of the lands in which there is no dispute, and leaves the defendants to claim their share in a fresh suit. This cannot be allowed. The plaintiff has not clearly shown that he relinquishes his claim to all other lands; and not having done so, and being in possession himself of other undivided property, he cannot, contrary to the agreement, which contemplates a single partition, sue for a parcel without including the whole claim. We, accordingly, confirm the decision of the lower appellate court with costs.

Decree confirmed with costs.

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Feb. 23.

Regular Appeal No. 20 *of* 1867.

UMEDSANGJI .....*Appellant.*
THE COLLECTOR OF SU'RAT .....*Respondent.*

Todá Garás Hak—*Presumption arising from long-continued Payment—Government's Liability to pay* Todá Garás.

Held that, whatever may be the right of the Government as to the collection of *todá garás* from villagers, where it does collect *todá garás* it is bound to pay over the amount so collected to the original *garásiá*, or his representatives if the *hak* is a perpetual one.

Where Government has paid a *todá garás hak* to a *garásiá* for a long and uninterrupted period of time, the *onus* of proving that the *hak* is not perpetual lies upon Government.

THIS was a regular appeal from the decision of C. G. Kemball, Judge of the district of Súrat, in Original Suit No. 6 of 1866.

The original plaintiff, Bháratsangji (whose heir the appellant is), instituted this suit to establish his right against the Collector of Súrat to receive annually and for ever a *toḍá garás hak* of Rs. 61 from the village of Mahudi, in the Chikli parganá, payable from the Government Treasury, and purchased by his father at an auction-sale in execution of a decree, and also to recover arrears of payment for seven years, during which period the Collector had collected the *haks* from the ryots. The *toḍá garás hak* was purchased by the plaintiff's father in 1832, and it was entered in his name in that year, and the *hak* was paid to him from 1832 to 1855. From 1856 it was discontinued. On the 4th of July 1859 the Collector made an order restricting the plaintiff's right of enjoyment of the *hak* in question to the duration of his life.

The Collector answered that the continuance or discontinuance of *toḍá garás haks* rests entirely at the pleasure of Government. As it was found by Government that Udebhái, who was the original *garásiá* proprietor at the time the British rule commenced, and whose *hak* was purchased by the plaintiff's father, had died without issue, it was determined that when third parties owned and enjoyed portions of Udebhái's *hak*, which had lapsed to Government by his death without

issue, they should be continued to such persons for the duration of their lives; and this order of Government was communicated to the plaintiff, restricting his estate to his own life.

The District Judge of Súrat laid down the following issues:—(I.) whether the plaintiff had any cause of action against the defendant; and (II.), if he had a good cause of action, what was the extent of his claim; and, finding in favour of the defendant on the first issue, he rejected the plaintiff's claim.

The following extracts from the judgment of the District Judge show the reasons on which he grounded his decision:—

"This is a claim against the Collector of Súrat in respect of a certain annual payment, called a *toḍá garás hak*, the continuance of which in its integrity the claimant asserts he has a right to demand from the Government. * * *

"*Toḍá garás*, as distinguished from the legally acquired and regularly descended *garás*, usually called *wanta*, is in fact a sum paid to a powerful neighbour or turbulent inhabitant of the village as the price of forbearance, protection, or assistance. The *hak* was neither more nor less than a species of black-mail exacted by freebooters from the villages.

"These yearly payments were at first collected by the *garásiás* direct from villages, and when necessary by force; after the commencement of British rule it became customary for them to obtain permission of some Government officer, and to give security that no violence should be resorted to before proceeding to levy the *hak*; and, lastly, they consented to forego their privilege of making the collections themselves, and receive the amount from the Treasury, and ever since 1811 they have received the payments from the Government Treasury.

"Now it has been laid down by some that by this last arrangement Government constituted themselves agents of, and rendered themselves liable to, the *garásiás* for the amount they actually received from time to time from the villagers. * * *

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"The point as to whether a positive obligation to continue the payments was undertaken by Government as a consequence of this arrangement can only be ascertained by determining the rights which the *garásiás* had as against the villages. According as the villages were, or were not, at the time when the change in the mode of payment took place, under a legal obligation to continue the contribution, will be the liability of Government. * * *

"The agreement of the villagers to pay the annual *hak* having been extracted by violence, the obligation which arose so had no legal validity. The *toḍá garás haks* had thus no legal origin, and the question now remains whether it was legalised by length of enjoyment. * * *

"It is true that in the judgment of the Judicial Committee of the Privy Council in *Sambhaldás's case** their Lordships said that 'Assuming, however, that *toḍá garás haks* began in wrong and violence, still that which had a vicious origin may in course of time have been legalised, since long enjoyment is itself a title, as well in favour of the recipients of an annual allowance out of land as of the possession of the land itself.' Long possession can itself, however, constitute no title. If it be undisturbed for a long time, it constitutes *primâ facie* evidence sufficient to throw the burden of disproof on the party disputing it, but it in no case affords an irrebuttable presumption of title. * * *

"*Toḍá garás haks* are not, moreover, payments out of land; they were originally a toll or tax levied upon the village community. Whether, looking to the existence of the tribute, or its nature and origin, length of enjoyment affords no presumption of title, and, not being a payment out of land, Reg. XVII. of 1827 has no application. Being in its origin a toll or black-mail levied upon the village communities by force, and its continued existence being referable also to force and fraud, enjoyment for length of time avails nothing. It could never have been good by grant, and it cannot be good by prescription. * * *

* 8 Moo. Ind. App. 1.

"The claim before me being both illegal in its inception, and incapable, from its very nature, of legalisation by any length of enjoyment, I am of opinion that Government could not become legally bound to admit it annually for ever, and that their revenue officers cannot be sued for its payment in a court of law."

The plaintiff appealed from this decision. When the appeal came on for hearing, on the 7th of September 1867, the Court (COUCH, C.J., and NEWTON, J.) remanded the case to the District Court with a direction to receive further evidence from both parties.

COUCH, C.J., on remanding the case, observed that the Court could not decide the case satisfactorily on the evidence before it, and that it would be necessary to have further evidence. The court below decided the case on general principles, without referring to the particular circumstances of the case, which stated that Government had collected the *hak* from the villages down to the institution of the suit. It becomes, therefore, necessary to see what was the arrangement between Government and the *garásiá* when the former continued to collect the *hak* for the latter. The plaintiff is the alienee of a former holder of the *hak;* and the question is whether he has a right to enjoy it after the extinction of the male issue of the original proprietor. The issue of Udebhái had been extinct, and the Collector's order was based on this, that the *hak* had lapsed to Government on the extinction of such male issue of the original proprietor. Mr. White, the Advocate General, who appeared for the respondent, contended that the *onus* of proving that the estate was absolute lay on the plaintiff. The Court, however, thinks that the *onus* is on the respondent to show that the estate is not absolute, but is limited in the way contended for by Government. The lower court has not determined upon the validity of the Collector's order, and fixed the nature and extent of the right of the *garásiás*, whether it was a right in perpetuity, or a right limited as contended for on the part of Government, on whom the *onus* clearly lies to cut down the apparently absolute interest of the *garásiás*

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which is to be presumed from their length of hereditary enjoyment. It is essential that we should have evidence on this point, and we must, under Sec. 354 of the Civil Procedure Code, frame an issue to be sent below.

The following issue was accordingly framed and sent to the District Court :—

"Whether the right or interest of the original *garásiás* in the *toḍá garás hak* was an absolute one to receive it in perpetuity, or was limited in duration to the existence of his direct male descendants."

The District Judge recorded the following finding on the above issue :—

"The plaintiff has put in no evidence on the issue sent down, and that adduced by the defendant merely tends to establish a custom of taking from the recipients security-bonds before the allowance was paid. This evidence does not directly touch the question sent down for trial. I must, therefore, determine on whom the *onus* falls of proving the nature and extent of the interest of the *garásiá*. And as I have decided that the claim against Government was not one that could be enforced in a court of law, I consider that it was for the plaintiff to show that the Government were compellable to pay the *hak* in perpetuity ; and, as he has failed to do this, I find that it was competent to the Government to continue the *hak* on any terms it might please to make."

The finding was returned on the 10th of June 1869.

The case came on this day for a second hearing before COUCH, C.J., and GIBBS, J.

Nánábhái Haridás for the appellant.

Scoble, Acting Advocate General (with him *Dhirajlál Mathurádás*), for the respondent.

COUCH, C.J. :—The Court does not set aside the orders of the revenue authorities. It declares that, notwithstanding these orders, this party is entitled to recover. We cannot declare the plaintiff to be entitled in perpetuity, because if Government were to cease to collect the *garás*, it might be that his remedy would not lie against the

Government, but against the villagers. Mr. White admitted at the previous hearing that the Government had collected the dues up to the date of the survey. The plaintiff is, in our opinion, entitled to recover up to that date arrears of the amount collected on his account by Government from the villages, whatever may be the extent of his interest. It is argued by the appellant that the *hak* is private property. In order to see whether it was a payment of such a nature that it should not be enforced against Government, we required further evidence when the case was last before us. The Advocate General, Mr. White, then stated that there were records and despatches of the Court of Directors bearing on the point. No such evidence, however, has been put in. And from the accounts it appears that the Government had been collecting the *haks* from the villages up to the year 1862. That being so, the character of the suit changes considerably, and the claim cannot be well resisted.

The broad question is thus no longer raised as to the power of Government to collect the *garás*, but the suit was whether, if Government have collected the *garás*, they were not liable to pay it over. It is simply a suit for the right to recover what had been collected. We asked the respondent to show that the *garásiá's* interest was of a limited nature, and allowed the case to go down in order that this issue might be tried. The District Judge was not, however, informed of our ruling as to the *onus* of proof; this is not, however, of any moment, as the evidence given is not such as to enable us to decide in favour of Government. It may be that in another case further or better evidence may be given; and our decision in this case, being based on the evidence before us, must not at all be considered as binding in other cases. The reasons given by the District Judge in impeachment of the legal character of the allowance by reason of length of enjoyment are insufficient, and opposed to the express decision of the Privy Council in *Sambhulal's case*. We, accordingly, declare that the plaintiff is entitled to recover all his arrears up to November 1862, notwithstanding the order of the 4th of July 1859. We award

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arrears from Samvat 1912 to 1918 inclusive, and simple interest at nine per cent. per annum on each payment as it accrued due until the date of the decree, and interest on the whole sum at six per cent. till the day of payment. The respondent to bear all costs.

GIBBS, J. :—I concur. This cannot be strictly called a *toḍá garás* case, and should not be cited as a precedent on that subject. No decision has been come to as to the nature of the *hak*—whether it is black-mail, or rent of *wanta* lands, or what; the decision is simply based on the admission of the respondent that he has collected the *haks* which are the subject of the suit from the villages, and is ready to pay them to whomsoever the Court orders.

Decree reversed with costs.

NOTE.—Special Appeal No. 21 of 1867 was decided on the same day on the same grounds.

Feb. 9.

Special Appeal No. 524 *of* 1869.

KISHORBHA'I GALLA'BHA'I and DESA'IBHA'I GALLA'BHA'I .....*Appellants.*

JORA'BHA'I DA'JI and MULJI VENIDAS...*Respondents.*

Registration—Mortgage—Subsequent Purchase—Priority—Notice.

Where, when Act XIX. of 1843 was in force, a purchaser bought land with notice of a prior unregistered mortgage which was referred to in the purchase-deed, the purchaser agreeing to pay off the mortgage, *it was held* that the purchaser took subject to the mortgage, notwithstanding its not being registered.

THIS was a special appeal from the decision of M. H. Scott, Acting Extra Assistant Judge at Ahmedábád, in Appeal Suit No. 43 of 1869, affirming the decree of the Munsif of Umret.

Kishorbhái and Desáibhái, the plaintiffs, sued to redeem a mortgaged field situated in the village of Od, in the Neriad táluká. They claimed as purchasers from the mortgagor of the defendants, under a registered deed of sale, dated the 25th of March 1864, in the following terms :—

"To Kishorbhái Gallábhái and Desáibhái Gallábhái this writing is passed by Rája Anopsoga Merubhái and three others.—We have sold to you the field as above named for Rupees 1,199. You are to enjoy the said field as long as the sun and moon last, with all that is above and below the said field. You are to pay the Government *salámi* and enjoy the field. If anybody obstructs your enjoyment, we, the vendors, will remove the obstruction. This field was mortgaged to Veṇidás Vallabhbhái for Rs. 751. You are to pay the mortgage-money and redeem the field. We have received the remaining Rs. 438 in cash from you, and have passed this document for the whole sum for which this field is sold to you."

The mortgage to the defendants was dated the 12th of April 1862, and was unregistered. The mortgage was conditioned for a term of twenty-one years.

The defendants answered that since the date of the mortgage they had become purchasers of the mortgaged land, and that the plaintiffs had no title to redeem.

The Munsif of Umret found that the plaintiffs' deed of purchase was proved. He also found that the deed of purchase set up by the defendants was unregistered, and could not prevail against the plaintiffs' registered deed.

The Munsif decreed that, as the defendants' mortgage was for a term of years, on the expiry of that term the plaintiff might, on payment of the mortgage-debt, redeem the land sued for.

The plaintiffs appealed to the District Judge, on the ground that the mortgage-deed of the defendants was not properly stamped and was not genuine.

Mr. M. H. Scott, the Extra Assistant Judge, held, on the preliminary point, that the deed was insufficiently stamped. He, however, allowed the defendants to make up the deficient stamp duty. On the merits he held that the mortgage-deed was genuine, as shown by the admissions in the deed of sale to the plaintiffs themselves.

On the remaining point, whether the defendants could claim adherence to the terms of the mortgage-deed, or could

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only claim the sum for which the land was mortgaged, the Assistant Judge observed—

"That the defendants alleged in their reply to the plaint that they had purchased the land from the mortgagor, they at the same time holding a mortgage on the land. The plaintiffs argue that (in this state of the pleadings) the defendants' rights under the mortgage merged in the purchase; which, however, has been disallowed by the lower court, chiefly on the ground that the plaintiffs' purchase-deed being registered and of a prior date, has priority over the defendants' unregistered and subsequent purchase. The defendants, however, have a right to fall back upon their mortgage, which is not cancelled by reason of the sale being void. I am borne out in this view by the judgment in Special Appeal No. 156 of 1863 (*a*). The mortgage-bond being genuine and not cancelled, the defendants have a right to insist upon the fulfilment of its conditions. The mortgagor would be bound by it, and he could not convey to the plaintiffs a better or other title than he himself possessed."

The Judge, accordingly, affirmed the decree of the Munsif.

The plaintiffs appealed against this decision, and the appeal was argued before WARDEN and GIBBS, JJ.

Nánábhái Haridás, for the appellants:—The plaintiffs are purchasers under a duly registered purchase-deed, while the defendants are mortgagees of an unregistered mortgage. As both the sale and mortgage are of a date previous to the commencement of Act XVI. of 1864, they are governed by Act XIX. of 1843 and Reg. IX. of 1827, Sec. 6.

A registered purchaser is entitled to priority over an unregistered mortgagee: *Purshotum Ranchord* v. *Jagjivan Mayaram* (*b*). The fact that the plaintiffs in this case had notice of the mortgage to the defendants does not, therefore, affect their claim to redeem the mortgage. As against them

(*a*) See *Hirachand Bábáji* v. *Bháskar Abábhat*, 2 Bom. H. C. Rep. 193 (2nd ed.).

(*b*) 1 Bom. H. C. Rep. 60.

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the conditions of the mortgage-deed have no efficacy, the mortgage-deed not being registered. The lower courts were bound, under the precedent quoted, to decree immediate redemption.

Shántárám Náráyan, for the respondents:—The case quoted from the first volume can be distinguished from the present case. The purchaser here bought only the equity of redemption from the mortgagor; the sale was not an out-and-out sale, and the plaintiffs can redeem only after the mortgage term is over.

WARDEN, J.:—We are of opinion that the plaintiffs in this case bought nothing more than the equity of redemption from the mortgagor. They were not only aware of the mortgage charge, which is recited in the deed of sale, but the mortgage debt formed a part of the consideration for the sale. The case quoted from 1 Bom. H. C. Reports is not, therefore, in point. The mortgage-bond cannot be adopted in part and ignored in part. It is found to be genuine, and must bind the purchaser who buys with notice, and undertakes to pay off the mortgage charge as part consideration for the sale, to the same extent as it would have bound the vendor of the plaintiffs. As the original mortgagor could not have sued to redeem before the term was over, neither can the plaintiffs sue for immediate redemption against the terms of the mortgage-bond. We, accordingly, confirm the decree of the lower courts with costs.

Decree confirmed with costs.

1870.
March 22.

Special Appeal No. 546 *of* 1869.

GOPA'L YA'DAVRA'V KESKAR.....*Appellant.*
KRISHN'A'PPA' bin MAHA'DA'PPA'.....*Respondent.*

Hindú—Dakhan Mortgage—Possession—Purchaser with Notice—Constructive Fraud.

The mortgagee without possession of certain lands in the Dakhan (under a mortgage-deed of the 1st of August 1864) on the 16th of April 1867 obtained a decree awarding to him possession of the mortgaged premises. On the 11th of July following, the mortgagor sold the mortgaged premises to the plaintiff, who had distinct notice of the mortgage. The deed of sale was duly registered. The plaintiff thereupon claimed to hold the premises free from the mortgage.

Held that, though a mortgage in the Dakhan must be accompanied by possession to give it validity against third parties, it is not absolutely void for want of such possession, and that the plaintiff, having notice of it, should not be allowed to hold the premises free from the mortgage.

THIS was a special appeal from the decision of S. H. Phillpotts, Acting Senior Assistant Judge of Solápur, in Appeal Suit No. 49 of 1869, confirming the decree of the Munsif of Bársí.

The plaintiff, Gopál Yádavráv, petitioned, under Sec. 230 of Act VIII. of 1859, to recover possession of a field (Survey number 269) in Mouje Khorephal, from the defendant, under the following circumstances:—

The plaintiff, Gopál Yádavráv, obtained a decree upon a money-bond against one Hari Rájárám, on the 7th of February 1867, and attached the land in dispute in execution of the decree on the 8th of February 1867. The defendant, Krishnáppá bin Mahádáppá, had a mortgage upon the land under a mortgage-bond dated the 1st of August 1864. This mortgage-bond was unregistered, and Hari Rájárám, the mortgagor, continued in possession. When the plaintiff petitioned for the sale of the land attached by him, the defendant opposed the application, and applied to the court to have the land sold subject to his mortgage-claim. The court, accordingly, ordered the land to be sold subject to the defendant's mortgage. Soon after, on the 11th of July 1867, Hari Rájárám sold the land privately to the plaintiff, in satisfaction of his claim under the decree, and gave him possession. The deed

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of sale was registered. The plaintiff's tenant in possession was dispossessed by the defendant, who, on the 16th of April 1867, had obtained a decree upon his mortgage-bond, ordering this property to be held by him till his mortgage was paid off, and in the execution of the decree he obtained possession of the land; and the plaintiff proceeded, under Sec. 230 of Act VIII. of 1859, to recover possession from the defendant.

The defendant answered that the private sale to the plaintiff was fraudulent, as, on the defendant's application in the execution proceedings consequent on the attachment by the plaintiff, the court had directed the land to be sold subject to the defendant's mortgage-lien. Upon the execution by Hari Rájárám of the deed of sale, the plaintiff withdrew his *darkhást*. The defendant further stated that he was in possession.

The Munsif of Bársí held that the land sold to the plaintiff was sold subject to the defendant's mortgage-lien, which, he held, was not invalid by reason of its being unregistered. He, accordingly, decreed that the plaintiff could not recover till the defendant's mortgage was paid off.

The plaintiff appealed to the District Court, and S. H. Phillpotts confirmed the decree of the Munsif, holding that "the appellant purchased the property with the mortgage-lien upon it. Hari Rájárám had no right to sell what was not his own, so, when he sold this field as unincumbered, he sold what he could not sell, because, on the 16th of April 1867, this property had been decreed to be held by the respondent till his mortgage-lien was paid off, and in that case Hari Rájárám was the defendant, and it was on account of his debt that this decree was made. This being the case, Hari Rájárám had no right on the 11th of July 1867 to sell the property as unincumbered to the appellant, and the appellant was rightly ejected, under Sec. 223 of Act VIII. of 1859, as the appellant cannot be in a better position than his vendor." He, accordingly, confirmed the Munsif's decree with costs.

The plaintiff appealed from this decision, and the appeal was argued before COUCH, C.J., and MELVILL, J.

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Dhírajlál Mathurádás, for the appellant:—This is a Dakhan mortgage, in which it is necessary that the mortgagee should be in possession to affect other incumbrancers or purchasers. Admitting that the appellant had notice of the mortgage-claim, it was a notice of a mortgagee without possession.

Shántárám Náráyan, for the respondent:—The title of the plaintiff under the bill of sale was created subsequent to the institution of the suit. The attachment was in February; from that date till July, when the sale took place, the plaintiff was only a creditor, and the decree did not bind the land. Meanwhile the defendant obtained his foreclosure decree on the mortgage-bond in April, so that the decree bound the land at the time of the sale to the plaintiff. The plaintiff is only a subsequent purchaser with notice of the previous incumbrance.

Cur. adv. vult.

COUCH, C.J.:—In this suit, which is founded upon an application to the Munsif of Bársí under Sec. 230 of Act VIII. of 1859, the facts are these. On the 1st of August 1861 Hari Rájárám Joshi mortgaged the land in dispute to the respondent, the original defendant. The land being situated in the Dakhan, it was necessary, according to the decisions of the Ṣadr Adálat—*Mulapa Mitaigar* v. *Rungapa*, S. A. 24 of 1860 (*a*); *Govurdhan Doolubdas* v. *Sukharam Ramchunder*, S. A. 23 of 1861 (*b*); and *Chuttrajee Dullajee* v. *Krishna Ramasett*, S. A. 24 of 1861 (*c*), that the mortgage should be accompanied by possession to give it validity. Possession was not given, but the Hindú law in force in the Dakhan does not make the contract in that case void. The contract is a valid one, and the mortgagee is entitled to possession, if default is made in payment of the mortgage-money. And, accordingly, on the 16th of April 1867, the respondent obtained a decree awarding possession of the land to him on default being made in payment of the money secured by the mortgage-bond. In the mean time, on the 7th of February 1867, the appellant, the plaintiff in this suit, having obtained a decree on a money-bond, attached the land; and the respondent applied to the court that

(*a*) 9 Harrington 499. (*b*) 8 Harrington 189. (*c*) Ibid. 193.

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it might be sold subject to his mortgage, which was ordered. The appellant had thus distinct notice of the mortgage, and for the purpose of notice to him it does not matter whether the order was regular or not—as a mortgagee not in possession could not come within Sec. 230 of Act VIII. of 1859 by being dispossessed, it may not have been a proper order. On the 11th of July 1867 Hari Rájárám Joshi sold the land to the appellant, and he thereupon claimed to be entitled to it free from the mortgage. The Munsif of Bársí held that his right to it was subject to the mortgage to the respondent, and his decree was confirmed by the Acting Senior Assistant Judge, from whose decision the plaintiff has brought this special appeal. Now the appellant before his purchase not only had notice of the mortgage, but in a proceeding to which he was a party, being the attaching creditor, an order was made that the land should be sold subject to it. It would be contrary to one of the most settled principles of equity to allow the appellant to recover possession of the lands freed from the mortgage, which is what he sought by his application, and now seeks by this appeal. The case belongs to the class of constructive frauds, in which the title of the purchaser is postponed and made subservient to that of the claimant of whose title he has notice. The objection taken by the appellant, that Sec. 223 of Act VIII. of 1859 is applicable to this case, cannot be allowed. For, supposing the decree of the 16th of April 1867 did not entitle the respondent to the possession, this objection is not consistent with the case made by the plaint, which does not seek to recover possession subject to the mortgage, but denies the right of the mortgagee altogether. And, further, it appears not to have been taken in either of the lower courts. We consider that in holding in this case that the appellant can only take the land subject to the mortgage we are not opposed to the rulings of the Ṣadr Adálat as to mortgages in the Dakhan. We are indeed only preventing the Hindú law, as there laid down, being used for the purpose of fraud. The decree must, I think, be confirmed with costs.

MELVILL, J., concurred.

Decree confirmed with costs.

1870.
April 6.

Regular Appeal under Act X. of 1865, *No. I. of* 1869.

In the matter of the Will of N. P. VAKI'L.

HAMA'BA'I and BEHRAMSHA' NASARVA'NJI ...*Appellants.*
BAMANJI NASARVA'NJI .....*Respondent.*

Will—Probate—Executrix by Necessary Implication—Act X. of 1865, *Sec.* 182.

The testator by his Will appointed Hamábái, his wife, guardian of his infant children, "*in order that of all his property she should carry on the management* (until his youngest son should attain twenty-two years of age), *and in the testator's name the management of his firm.*" He appointed his brothers, R and M., his *vakils* to settle any quarrels that might arise, and directed them not to give unjust advice, but should the *vakils* give unjust advice Hamábái was not to act upon it. Upon certain contingencies Hamábái and the *vakils* were to separate, and make over to the sons their shares.

Held that Hamábái was by implication appointed sole executrix, and that she alone, to the exclusion of the testator's brothers, was entitled to probate.

THIS was a regular appeal, under Sec. 263 of Act X. of 1865, from an order of C. G. Kemball, District Judge of Súrat, in the matter of the application for probate of the last will and testament of Nasarvánji Pestanji Vakíl.

Nasarvánji Pestanji Vakíl, a resident of the city of Súrat, died on the 2nd day of March 1869, leaving him surviving a widow, Hamábái, and five sons, Bamanshá, Behramshá, Barjorji, Dinshá, and Hormasji, all of whom except Bamanshá were at their father's death minors.

Nasarvánji left a Will, bearing date the 18th of April 1867, the material portion of which for the purpose of this report was as follows :—

"Out of my five sons now living, only one son, Bamanji aforesaid, is of mature age, and the other four sons are minors. I have, therefore, appointed my wife, the said Hamábái, as the guardian of all, that is, the said four sons, and any other son and daughter that may be born to me hereafter, in order that of all my property of all kinds (she may carry on) the management until my last son becomes mature of 22 years,

(and) in my name the management of my firm; I have appointed my brothers, Ratanshá and Moṭhábhái, my *vakils*, in order that should there be mutual quarrels between, they shall settle the same, and direct to act justly. Likewise the office of guardianship my wife aforesaid shall duly carry on. But the said *vakils*, out of partiality to any one, shall not give unjust advice to the said guardian. Should the *vakils* give unjust advice, she shall not act thereupon."

On the 13th of April 1869 Hamábái, the widow, and Behramshá, the second son, of the testator (Behramshá having then attained his majority), applied for probate of the Will.

Bamanshá, the eldest son of the testator, entered a caveat.

The District Judge made the following order:—

"Having carefully heard the Will read over, and listened to the arguments, I am of opinion that no probate can be granted, for I can find nothing in support of the application, either under express appointment or according to the tenor of the Will. While, however, rejecting the application, I would state that looking to the contents of the Will, this court will be prepared, in the event of an application being made, either by the widow, Hamábái, in conjunction with her hate husband's two brothers, Ratanshá and Moṭhábhái, who are styled by the testator as his *vakils*, or by the widow alone in the event of the brothers refusing to join her, to grant letters of administration, in the face of any objection the present caveator may think fit to make."

Against this order of the District Judge Hamábái and Behramshá appealed, and the appeal was argued before COUCH, C.J., and GIBBS, J.

Anstey and *McCulloch* (with them *Nánábhái Haridás*), for the appellants:—The testator's intention evidently was to appoint his wife as executrix, the *vakils* being joined to her as legal advisers to settle any disputes that might or may arise. In the succeeding clauses the guardian and the *vakils* are mentioned together, as in paragraph 6, which provides that upon a certain contingency occurring they (the wife and the *vakils*) are to separate and make over (to the sons)

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their shares." Further on, in the same paragraph, the Will says that "she is duly to execute her guardianship, with the instructions of the aforesaid *vakíls*, until my last son shall attain the age of 22 years." These directions do not make the *vakíls* co-executors. When an executor is appointed, and other persons are appointed as overseers or advisers, that does not make the latter co-executors. In this case the testator appoints the *vakíls* expressly to settle disputes and make a fair distribution. The wife, who is appointed to manage all the estate and the business of the firm, is not to be controlled by the *vakíls*, who have only to advise her and give her proper instructions:—*In the goods of Manley* (*a*); *In the goods of Baylis* (*b*); *In the goods of Oliphant* (*c*); Cootes' Practice, p. 23; Williams on Executors, Part I., Bk. III., Ch. 2.

Shántárám Náráyaṇ, for the opponent:—The lower court refused to grant probate because neither by express direction, nor by necessary implication from the terms of the Will, can it be collected that the testator intended his wife to be executor. The clause is too uncertain to have that effect. The widow has only been appointed guardian of the minor sons, which may perhaps enable her to obtain a certificate under Act XX. of 1864, Sec. 6. [COUCH, C. J.:—Who do you say ought to have the probate?] The *vakíls* may be appointed executors. [COUCH, C. J.:—They are only named as advisers, and the widow is not bound to follow their advice. And the words "should there arise mutual disputes" show that the *vakíls* were meant only for the purpose of advising. You must look to the context.]

COUCH, C.J.:—Sec. 182 of Act X. of 1865 appears to be compiled almost verbatim from cases collected in the work of Mr. Williams on Executors, as are many more sections of the Act framed upon cases decided in the English courts. This shows that the Indian Legislature thought that the Indian law of succession might be fitly illustrated by English precedents. Sec. 182 says that the appointment of an executor may

(*a*) 3 Sw. & Tr. 56. (*b*) Law Rep. I. P. & D. Ca. 21.
(*c*) 1 Sw. & Tr. 525.

be express or by necessary implication, and if by any word or circumlocution the testator recommend or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors: (I. Williams on Executors 230, 6th ed.). This is what is meant by "necessary implication."

The question here is whether the rights appertaining to an executor have been given to the widow. Cl. 5 of the Will appears to amount to this, that the wife is appointed guardian of the four minors, and the testator commits to her not only the management of the estate of these minor sons, but of all his property and effects of all descriptions, and also of the business of the firm. And he appoints two persons as *vakils*, not to act as co-executors, but to advise the executrix in all questions between her and her sons. It is true two Wills are never likely to have the same expressions. The Native writer of the Will was probably not conversant with English forms; and, therefore, the cases decided at home cannot be understood as decisive here, but they may be used as illustrations. The word *vakil* must, therefore, be understood with reference to the context, and I think the fair construction is that the widow was to perform the duties and have the rights of an executor. It is a very informal clause, but it is sufficiently indicative of the testator's intention to appoint her executor during the minority of the sons. The joining together of the wife and the *vakils* in paragraph 6 is not inconsistent with this construction of the previous paragraph, as she is only directed to act with their advice; the wife and the two *vakils* mean nothing more than the executrix acting with the advice of the two *vakils*. The 14th clause appears to have a limited application. I do not think the testator intended to give Behramshá anything more than a power to obtain such a certificate as would enable him to draw dividends. This is certainly not the same power which the testator gave to the widow. My conclusion, therefore, is that probate ought to be granted to the widow only.

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GIBBS, J.:—I entirely concur with my Lord as to the construction to be placed upon paragraph 5 of the Will. Mr. Nasarvánji, when he made it, was doubtless in happy ignorance of the Indian Succession Act, for I find no Gujaráthi translation of it had been published in 1867, and I remember Mr. Nasarvánji, who was a pleader in my court at Súrat, did not understand English. From a consideration of the whole Will, I believe he meant his wife, in whom he seems to have had great confidence, to have full power to administer the estate, and he appointed the *vakíls* only as advisers to assist her in case of disputes. He was aware that some certificate was required to get dividends paid, and doubtless, considering his widow would not be able to go to Bombay for such purposes, he joined his son Behramshá with her for this purpose only.

We have to apply an Act to this Will of which the testator was ignorant, and we must place a liberal interpretation on his words, and not allow the estate to be managed by other than the person he wished to have charge thereof. There is no doubt that the opponent, Behramshá, was never intended to have any share in the management, and I feel convinced the fair construction of paragraph 5 is, that it was the testator's intention to appoint his widow the executrix of his Will; to her, therefore, probate should be granted.

Order reversed. Probate to go to the Widow. Costs on Respondent.

1870.
July 21.

Special Appeal No. 568 *of* 1869.

MOHANA', widow of GUMA'NI' .....*Appellant.*
SHEKH SA'DODIN *et al.* .....*Respondents.*

Lease—Stipulation against Subletting—Injunction—Equity.

Where a lease contained a stipulation against subletting without the lessor's consent, and the lessee violated this stipulation: it was held that the stipulation was a reasonable one, and that the lessor might either bring an action for damages for its breach, or a suit for an injunction to restrain such subletting by the lessee.

THIS was a special appeal from the decision of Baron De H. Larpent, Joint Judge at Puṇá, in Appeals Nos. 292 and 304 of 1867, amending the decree of the Principal Ṣadr Amín of Puṇá.

The plaintiffs sued the special appellant Mohaná and one Dinshá to set aside a lease in perpetuity of a piece of land alleged to have been given by the former to the latter, averring that the plaintiffs had let that piece of land to Mohaná on the condition that she should not let in any person without their consent.

The defendants pleaded, *inter alia*, that it was competent to Mohaná to dispose of what she had herself derived from the plaintiffs.

The Principal Ṣadr Amín gave a decree in favour of the plaintiffs, and directed the lease by Mohaná to Dinshá to be set aside, finding that, under the terms of the lease, the former had no power to alienate it to the latter without the plaintiffs' consent.

The Joint Judge amended the decree of the court of first instance, and cancelled only so much of the lease to Dinshá as empowered him to build upon the land.

The special appeal was heard before MELVILL and KEMBALL, JJ.

Páṇḍurang Balibhadra appeared for the special appellant.

Shántárám Náráyaṇ for the special respondents.

Per CURIAM:—We think that the agreement No. 3 bound the appellant not to let in a third person without the

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respondents' consent. This was a reasonable stipulation, and one which is very commonly inserted in leases. When this covenant was broken a cause of action arose, and a Court of Equity will interfere to restrain a breach of such an agreement. We consider that it was competent to the courts below to make an order restraining the lease altogether; but as neither Dinshá nor thē plaintiffs have appealed against the Judge's decree, which simply amounts to an injunction against building on the land, we are not called upon to go further, or to declare the lease void.

Decree affirmed.

1870.
June 24.

Appeal No. 3 *of* 1870 *under Act XXVII. of* 1860.

VISHVANA'TH HARI *et al.* .....*Appellants.*

Certificate to collect Debts—Refusal to grant Certificate—Appeal—Act XXVII. of 1860.

No appeal lies from an order of a District Judge refusing to grant a certificate under Act XXVII. of 1860.

THIS was a petition of appeal against an order of R. F. Mactier, Judge of the District of Sátárá, refusing to grant a certificate, under Act XXVII. of 1860, to enable the petitioners to collect the debts due to their deceased father, Krishṇáji Báji Bhágvat. The refusal was based upon the fact that a certificate to administer the property of the deceased had already been granted to his eldest son under Reg. VIII. of 1827.

The application was heard by LLOYD and KEMBALL, JJ.

Nágindás Tulsidás, for the appellants :—This appeal is brought under Sec. 6 of Act XXVII. of 1860. [LLOYD, J. :—Sec. 6 says "the granting of such certificate may be suspended by an appeal to the Sudder Court;" but it does not say that an appeal shall lie to the Ṣadr Court against the refusal by the District Judge to grant a certificate, nor does any such inference follow.] "Granting a certificate" necessarily includes the refusal to grant it. An appeal must be against some order; that order may be for granting, or for refusing to grant, a request made; there cannot, in the very nature of the thing, be an appeal by the man whose request is granted. Therefore, the appeal, which Sec. 6 undoubtedly gives, must be by the person whose request is refused. Moreover, the section gives the Ṣadr Court power to declare the party to whom the certificate should be granted. This evidently means that this Court can order a certificate to be granted to a person to whom the District Judge has refused it. Now, how is this court to proceed? It cannot proceed *ex mero motú*. It must, therefore, proceed upon the application of the losing party.

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PER CURIAM:—The Court is of opinion that it is discretionary with the District Judge to grant or to refuse a certificate under Act XXVII. of 1860, and that, if he has refused to grant a certificate, no appeal lies, under Sec. 6 of the Act, against his order.

Appeal dismissed.

June 27.

Special Appeal No. 104 *of* 1870.

VITHU bin MA'NKU .....*Appellant.*

AMRITA' bin JOTI .....*Respondent.*

Pátilki Watan—*Eldership—Act XI. of* 1843—*Jurisdiction.*

Where the plaintiff sued to be declared entitled to the office of *Mulki Pátil* in the village of Kotávery, as being the senior of his family, and alleged that the defendant, the actual incumbent of that office, had no right to share in the management of the *watan*, and had, in fact, until 1866, upon the death of the father of the plaintiff, never done so, it was held that the Civil Courts had jurisdiction to entertain the claim of the plaintiff.

Abáji bin Sankroji v. *Niloji bin Báloji* (*a*) distinguished.

THIS was a special appeal from the decision of R. F. Mactier, District Judge of Sátárá, in Appeal Suit No. 196 of 1869, reversing the decree of the Munsif of Máyaní.

The plaintiff, Viṭhu bin Máṇku, sued to obtain a declaration that he was the *vaḍíl* (senior) in his family, and, as such, entitled to hold permanently the office of *mulkí páṭíl* in his village, Kotávery. He stated that the *watan* had been in his family for more than one hundred years, till the death of his father in 1866, when the revenue authorities made the defendant *páṭíl*, and referred the plaintiff to the Civil Court. He, therefore, brought this suit to have his right to the *watan* declared, and to be declared entitled to do the work, take the proceeds, and enjoy the *mánpán*.

The defendant answered that the plaintiff was a stranger to the *watan*, which belonged to him, the defendant, as *vaḍíl* or senior, and that the duties vested in him as such.

(*a*) 2 Bom. H. C. Rep. 363 (342, 2nd ed.).

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The Munsif of Máyaní decided that the plaintiff was entitled to the *watan*, and that the defendant had never had the *vahivát* or enjoyment of it. He, accordingly, declared that the plaintiff was entitled to the office and emoluments and *mánpán* of the *mulki pátil*.

The defendant appealed to the District Court of Sátárá, and R. F. Mactier, District Judge, reversed the decision of the Munsif, on the preliminary ground that a Civil Court had no jurisdiction in the matter. He delivered the following judgment:—

"On this point a final decision of the High Court has been given in a case precisely like this, Special Appeal No. 582 of 1863, from this district, *Abáji bin Sankroji* v. *Niloji bin Báloji* (*b*), that a Civil Court has no jurisdiction in the matter.

"And even if it were proved that the plaintiff was *vadil*, the court has no jurisdiction to substitute him as *pátil*. I consider that this court has here no jurisdiction, and that, moreover, to pass any decree such as is asked for, and which would be in effect contrary to the orders of the Collector passed under Act XI. of 1843, which gives him full authority in such cases, would be wrong. A court has no business to make orders which it cannot carry out. To reject the present claim does not seem to interfere with Sec. 15 of the Civil Procedure Code, and to admit it and decide without power to carry out its orders, would be ridiculous, and lower the authority of this court and of the Collector, who has full authority to give orders in such cases, and who would not listen to a decree of this court, even if it were made, in favour of the plaintiff. I, therefore, dismiss this claim, with costs on the plaintiff."

The plaintiff appealed from this decision, and the appeal was argued before GIBBS and LLOYD, JJ.

Dhirajlál Mathurádás for the appellant.

(*b*) 2 Bom. H. C. Rep. 342 (2nd ed.).

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PER CURIAM :—There is a difference between this case and that alluded to by the District Judge, and reported in the second volume of the Bombay High Court Reports at p. 342 (2nd ed.) In the latter case both parties were admittedly sharers, and the original plaintiff wished to be declared "*vaḍíl*," and the High Court refused so to declare.

In the present case the original plaintiff alleges that the original defendant has never shared in the management of the *watan* at all, and that he (the plaintiff) is sole owner. This is a different matter, as, under Act XI. of 1843, the Collector must choose between the sharers. If, therefore, the original defendant be not a sharer, his appointment would not be legal. We consider, therefore, that the District Judge was in error in not trying the present appeal on its merits; and we reverse his decree, and return the case to the District Court for this purpose: costs to follow.

Decree reversed and suit remanded.

June 29.

Miscellaneous Appeal No. 6 *of* 1869.

VIRSINGA'PPA' bin BASLINGA'PPA' .....*Appellant.*
SADA'SHIVA'PPA' A'PPA' GOLKHANDI and
ANANTACHA'RYA bin HARI ACHA'RYA ...*Respondents.*

Court's Sale—Setting aside Sale—Fraud in conducting Sale—Irregularity—Civ. Proc. Code, Secs. 256 *and* 257.

The provision contained in Sec. 256 of the Code of Civil Procedure, that applications to set aside a Court's sale of immoveable property must be made within thirty days from the date of the sale, relates only to applications to set aside the sale for irregularity, and not to cases in which there has been a fraud committed by the officer of the Court who conducts the sale.

THIS was a miscellaneous appeal from an order passed by J. R. Naylor, Acting Senior Assistant Judge of Kaládgi, refusing to set aside a sale alleged to have been made by auction in execution of a decree, on the ground that the sale had already been confirmed by his predecessor.

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The facts of the case were as follow :—Sadáshiváppá, one of the respondents, obtained a decree against the appellant upon a money claim, and, in execution of that decree, attached certain lands and villages belonging to the latter. The proclamations of sale were issued on or about the 28th of March 1867. The sale was commenced before the 28th of April, and was then postponed to the 29th and 30th, when the Názar informed the people assembled that fresh advertisements would be necessary, and that the sale would take place again. On the 5th of May the Názar reported that the property had been sold, and represented the two respondents as the purchasers, one of whom, Sadáshiváppá, was also the execution-creditor, at whose instance the property was sold. He further requested an immediate confirmation of the sale, on the ground that sowing-time had arrived. Before this, namely, on the 30th of April, Sadáshiváppá had applied to have the sale set aside, on the grounds that it had taken place within a month of the notification, and that in consequence very few people attended, and that the price obtained was very low. On the 14th of June the appellant forwarded by post a petition asking that the sale should be cancelled, and alleging several illegalities in the conduct of it. But the sale was confirmed by the Judge, Mr. Sandwith, on the 19th of June. On the 25th of June the same Judge suspended this confirmatory order without recording any reasons. On the 27th Sadáshiváppá applied to withdraw his petition of the 30th of April, on the ground that he had found that he had incurred no loss by the lowness of the price; and on the 29th the sale was reaffirmed. In the month of October following the Názar disappeared.

Upon the evidence in the case, Mr. Naylor found that there had been no *bonâ fide* sale by auction, and that the Názar, in league with the two respondents, had been guilty of gross fraud. But he declined to interfere with the sales, on the ground that they had already been confirmed by Mr. Sandwith.

Against this order Virsingáppá appealed, and the appeal was argued before WESTROPP, C.J., LLOYD and KEMBALL, JJ.

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Nánábhái Haridás, for the appellant:—As the Judge has found that there was collusion between the Názar and the judgment-creditor, and that the price obtained was absurdly below the real value, there was in fact no actual sale—no sale that could be confirmed; and, therefore, Secs. 256 and 257 of the Code of Civil Procedure have no application, and the clause that limits the application to set aside the sale to thirty days does not apply.

Anstey (with him *Shántárám Náráyán* and *Vishnu Moreshvar*), for the respondents:—This court has no jurisdiction. There was an appeal open to the other side, and the order appealable was that in confirmation of the sale. But the thirty days allowed by law for the appeal have now passed. The words of Section 256, "namely, no sale shall be set aside on the ground of such irregularity, unless the applicant shall prove to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity," imply that after confirmation the sale becomes absolute. [WESTROPP, C.J.:—But this section is conversant with cases of irregularity only, not of fraud.] Then the fraud of the Názar should not prejudice the execution-creditor, who was no party to it, and who even petitioned against the sale on the 30th of April. A contract by a purchaser at an auction not to bid against another is not illegal; *Heffer* v. *Martyn* (*a*); *Galton* v. *Emuss* (*b*); *Re Carew's Estate* (*c*); Sugden on Vendors and Purchasers, 117 (14th ed.). In *Heffer* v. *Martyn* Lord Romilly said, speaking of such a contract, "I had to consider this in the matter of *Re Carew's Estate*; and I came to the conclusion that it is not illegal." Also, with regard to alternative advertisements see *Govind Hari Válekar* v. *Bank of India* (*d*).

Nánábhái, in reply:—The Judge has found that there was no auction-sale, and also that the confirmation by Mr. Sandwith was the result of the Názar's fraudulent representations.

(*a*) 36 L. J. Ch. 372. (*b*) I. Col. 243; S. C. 13 L. J. Ch. 383.
(*c*) 26 Beav. 187. (*d*) 4 Bom. H. C. Rep., A.C.J. 164.

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WESTROPP, C.J.:—We do not think that Secs. 256 and 257 of the Code of Civil Procedure are of any application in the present case, as they do not relate to cases in which fraud is shown. Mr. Anstey says, and says correctly, that in the first petition of the appellant there was a clause which alleged what is tantamount to fraud; and if that had been inquired into by Mr. Sandwith, and if he had made his order on it, there would have been some difficulty in interfering with it. But Mr. Sandwith did not at all inquire into the fraud. His attention may have been diverted from the charge of fraud by its long sequel in the petition, and there has been no investigation of that charge. Mr. Sandwith took no evidence on the collusion between the Názar and the execution-creditor. The charge of fraud is, therefore, not *res judicata*. We think, accordingly, that, as a case of fraud has been clearly made out, the order confirming the sale, as well as the order of Mr. Naylor refusing to set aside the confirming order, should be reversed. We order the property to be put up again to auction, a proper time for which will be fixed on by Mr. Naylor. The respondents must pay the costs of these proceedings. The purchase-money, if lodged in court by the purchasers (the respondents), should be refunded after deducting those costs, and any other expenses relative to the sale or otherwise which may be just.

Order reversed.

Referred Case.

July 12.

BA'BA'JI bin LAKSHMAN ..... *Plaintiff.*
MA'RUTI bin RA'GHOJI ..... *Defendant.*

Promissory Note bearing English and Native Dates—Computation of Time—Payment.

The period of payment stipulated in a promissory note bearing both English and Native dates should, when the parties are Hindús, be reckoned according to the Native calendar.

CASE stated by Ráv Bahádur Janárdhan Vásudevji, Judge of the Court of Small Causes at Puṇá, for the orders of the High Court :—

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"Whether the period of payment stipulated in a promissory note should be reckoned according to the English or the Native calendar when the note bears both the Native and English dates.

"This question has arisen in reference to a plaint which has been presented to this court by one Bábáji bin Lakshman, suing on a promissory note bearing the Native date Mágh Shudh 14th, Shake 1787, and the English date 29th January 1866, and payable in one year. If the year be calculated in reference to the English calendar, it expires on the 29th of January 1867, and the claim was barred at the date of the presentation of the plaint. If it be calculated in reference to the Native calendar, it expires on the 17th of February 1867, and the claim is within the period prescribed. This difference arises from an intercalary month (Adhik Jesht) having occurred in the Native year Shake 1788.

"When the parties use both Native and English dates in the instrument executed between them, I should think that the period of payment stipulated in the contract may be calculated in reference to the English, and not the Native, calendar."

The reference was considered by GIBBS and MELVILL, JJ.

PER CURIAM:—The court is of opinion that, as the parties in the case are Hindús, the presumption is that they intended to calculate the time according to the Hindú era, and this presumption is not rebutted by the circumstance that the English as well as the Native date appears in the document.

Special Appeal No. 111 *of* 1870. 1870. July 18.

GANPATRA'V RANCHHODJI .....*Appellant.*

BA'I SURAJ, widow of RANCHHODJI .....*Respondent.*

Jurisdiction—Remand—Civ. Proc. Code, Sec .6.

A plaint, presented to a Court not being the Court of the lowest grade competent to try it, was returned to the plaintiff. It was subsequently registered by the same Court, in obedience to an order of the District Judge, and a decree was passed in the plaintiff's favour. On appeal, the defendant pleaded want of jurisdiction in the Court below. The plea was overruled, and the case remanded for retrial on its merits. The Court of first instance again passed a decree in favour of the plaintiff, and the defendant again urged his plea of jurisdiction in appeal, but the Judge declined to go into it a second time.

Held that, the suit not having been instituted in the Court of the lowest grade competent to try it, the District Judge had no power to direct the Court of first instance to hear the case, and, although no special appeal was preferred against the decree of the District Judge in which he remanded the case for retrial, it was still open to the defendant in special appeal to raise the plea of jurisdiction.

THIS was a special appeal from the decision of C. G. Kemball, Judge of the District of Súrat, in Appeal Suit No. 195 of 1869, affirming the decree of Mukundráí Maniráí, First Class Subordinate Judge of Súrat.

The plaintiff alleged that she was the heir of her husband, Ranchhodji, who died at Barodá in 1854, leaving property, part of which is situated at Ankleshwar; and that she applied to the Senior Assistant Judge at Broach for a certificate of heirship. Her application was refused, and she was referred to a Civil suit. She now (*i.e.*, November 1865) sued in the court of the First Class Subordinate Judge at Súrat, for a decree declaratory of her title to inherit the property of her husband.

The defendant answered that the action was barred by the law of limitation, the cause of action having arisen at the date of the plaintiff's husband's death, and not when the Senior Assistant Judge refused to grant her a certificate of heirship; that the defendant himself, having been adopted by the said Ranchhodji, who was his uncle, with the

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sanction of His Highness the Gáikwád, and in the presence and by the acquiescence of the plaintiff, was the rightful heir; and that the plaintiff's real place of abode was Baroda.

The First Class Subordinate Judge at first considered that the defendant lived beyond his jurisdiction, and that the cause of action also arose beyond his jurisdiction, and, therefore, returned the plaint to the plaintiff; but, being ordered by the Judge to go on with the case, he did so, and passed judgment for the plaintiff, on the ground that, even if the adoption of the defendant by the husband of the plaintiff were proved, the transaction was contrary to Hindú law.

On appeal, the Judge reversed the decree of the Subordinate Judge, and returned the case to him for retrial on the merits, as he found that the court of first instance, having disposed of the case under a misapprehension regarding the effect of an illegal adoption, did not take such evidence of the fact of adoption as was necessary in order to ascertain the rights of the parties.

The Subordinate Judge again passed a decree in favour of the plaintiff, on the ground that the defendant had failed to prove the adoption set up by him.

The Judge, on appeal, declined to reopen the question of jurisdiction, and, agreeing with the lower court in the appreciation of evidence, confirmed its decree.

The Special Appeal was heard before LLOYD and MELVILL, JJ.

Nánábhái Haridás, for the special appellant:—The order of the District Judge directing the court of first instance to receive the plaint, which it returned to the plaintiff for want of jurisdiction, is *ultra vires*, there being no appeal against such an order. The Court of the First Class Subordinate Judge was not the court of the lowest grade competent to try this suit, and this incompetency is not removed by any illegal order of the Judge. This objection is fatal: *Bidhoobudden* v. *Doorga* (*a*).

(*a*) 2 Calc. W. Rep., Civ. R. 157.

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Dhirajlál Mathurádás, Government Pleader, for the special respondent:—The proper time for raising the question of jurisdiction has gone by. When the District Judge remanded the case for retrial on the merits by the court of first instance, a special appeal should have been made to this court, and the question of jurisdiction raised. It was held in the case of *Temulji Rustamji* v. *Fardunji Kávasji* (*b*) that after a remand by the High Court for retrial of a suit on the merits, the lower appellate court had no authority to raise a question of jurisdiction for the first time. *Bhái Trímbakji* v. *Toma valad Kutur* (*c*) was also referred to.

LLOYD, J.:—This suit not having been instituted in the court of the lowest grade competent to try it, the District Judge had no power to direct the court of first instance to hear the case, and although no special appeal was made against the decree of the District Judge, in which he disposed of the question of jurisdiction, and remanded the case for retrial, we are of opinion that it is now open to the defendant to make the objection he has done, as a question of jurisdiction may be taken notice of at any time it may be raised.

We, therefore, annul the decrees of the lower courts, and direct the plaint to be returned to the plaintiff, in order that she may present it in a court having jurisdiction.

Decree reversed and plaint returned.

(*b*) 5 Bom. H. C. Rep., A. C. J. 137.
(*c*) 2 Bom. H. C. Rep. 192 (2nd ed.).

1870.
July 21.

Special Appeal No. 175 *of* 1868.

DA'DA'BHA'I NARSIDA'S .....*Appellant.*
THE SUB-COLLECTOR OF BROACH .....*Respondent.*

Possession—Onus Probandi—*Reg. XVII. of* 1827—*Bombay Act I. of* 1865—*Bombay Act IV. of* 1868—*Act XIV. of* 1859, *Sec.* 15.

Semble that Reg. XVII. of 1827 and Bombay Act I. of 1865 were not applicable to building-sites in towns and cities until Bombay Act I. of 1865 was expressly made applicable to such sites by Bombay Act IV. of 1868.

The law obtaining in India requires that in actions of ejectment the courts should always enforce the rule that a plaintiff must recover by the strength of his own title; and a party who might have shifted the burden of proof, if he had proceeded under Sec. 15 of Act XIV. of 1859, cannot, if he let slip that opportunity, obtain the same advantage in an action of ejectment.

Semble—Mere possession as a trespasser is not sufficient to entitle a plaintiff to recover in a suit brought under Sec. 15 of Act XIV. of 1859. There must be in the plaintiff juridical, as opposed to mere physical, possession.

THIS was a special appeal from the decision of C. G. Kemball, Judge of the District of Súrat, in Appeal Suit No. 152 of 1868, affirming the decree of S. H. Phillpotts, Acting Senior Assistant Judge at Broach.

The special appeal was heard before LLOYD and MELVILL, JJ., on the 6th of August 1869, the 22nd of November 1869, and the 17th of June 1870.

Shántárám Náráyaṇ for the appellant.

Dhirajlál Mathurádás, Government Pleader, for the respondent.

The facts sufficiently appear from the following judgments, which were delivered on the 21st of July 1870.

MELVILL, J.:—The plaintiff in this case sues for possession of a piece of ground in the town of Broach, alleging that he purchased it on the 29th of May 1865 and took possession of it, but that he was served with a notice, and was finally ejected, by the defendant, the Sub-Collector of Broach, on the ground that the land belonged to Government.

The Sub-Collector's defence was that, under the provisions of Reg. XVII. of 1827 and Bombay Act I. of 1865, the land in dispute was liable to the payment of assessment, and that he had taken measures accordingly; that the land belonged to Government, and had not been given to the plaintiff with the sanction of the Collector, as required by Sec. 7 of Reg. XVII. of 1827; that it had been lying waste for many years, and that the suit was barred by lapse of time; and that there was nothing to show that the plaintiff's vendors had any title. Such appears to be the substance of the defence, though it is not very clearly or logically expressed.

So much of the defence as relates to the application of Reg. XVII. of 1827, and Act I. of 1865, to land in towns, and to the right of Government to levy assessment on such land, seems hardly relevant, for the papers in the case show that the plaintiff was not ejected because he refused to pay assessment. He was first served with a notice that, as the land was Government land, and he had occupied it without permission, he was to pay ten times the ordinary assessment. The demand was afterwards reduced to five times the ordinary assessment; and the final order of the Collector was that the plaintiff might purchase the ground for two rupees a square yard, but that, if he refused to consent to these terms, any building which he might commence upon the land would be removed.

If it be necessary to express any opinion as to the applicability of statutes which do not seem to have been applied, I would say that a consideration of the general scope and particular terms of Reg. XVII. of 1827, and Act I. of 1865, leads me to the conclusion that these statutes were not applicable to building-sites, in towns and cities until Act I. of 1865 was expressly made applicable by Bombay Act IV. of 1868.

The real question, and one which appears to me to be raised with sufficient distinctness by the pleadings, is the question of title. The courts below have found that the plaintiff has failed to prove his title. But it has been objected before us

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that the *onus probandi* has been improperly laid on the plaintiff; that he was in possession until ousted by the defendant; and that, inasmuch as possession is good against all the world except the rightful owner, he is entitled to succeed on the ground of possession only, unless the defendant is able to prove a good title.

The appellant's pleader wishes us to affirm the proposition that it is sufficient for a plaintiff in ejectment to show prior possession, however it may have been obtained, and for however short a time it may have been enjoyed. He maintains, if I have understood him correctly, that occupation, obtained even by force or fraud, and held for no more than an hour, is sufficient to support the plaintiff's claim, and to throw upon the defendant the task of proving his title. From this view of the law I have often expressed my dissent, and I now do so again. It is opposed to reason and justice, and I can find no authority in support of it.

In *Doe* v. *Dyeball* (*a*) a party had received the key of a room from the lessor of the plaintiff, and held the premises for about a year, when the defendant broke in at night and took forcible possession. Lord Tenterden, C. J., held that the plaintiff's possession was sufficient to maintain ejectment, without any further proof of title. This decision was referred to, and followed, in *Asher* v. *Whitlock* (*b*), in which case Cockburn, C.J., said that the same principle was applicable, although the possession of the defendant had not been obtained by actual force, for that "a person being peaceably in possession of a house, a person going in and taking possession without his leave commits a trespass, and all trespass implies force in the eye of the law." But I apprehend that I am rightly interpreting these decisions when I say that they apply only to cases in which the person who is ousted has been for some time previously in peaceable and undisturbed possession—such possession as, being acquiesced in, creates a presumption of title—what the Roman jurists designate juridical possession, as distinguished from mere

(*a*) Mood. & M. 346. (*b*) L. R I. Q. B. 1.

detention (Von Savigny on Possession, S. 1; Domat's Civil Law, Sec. 2134). A mere trespasser, unless his occupation be acquiesced in, acquires no such possession, and may be expelled by main force. In *Browne* v. *Dawson* (*c*) the plaintiff was a schoolmaster, who had been dismissed by the trustees, and had given up his room, which was taken possession of by them and locked up. He returned on the next day and broke open the room. He was required by notice to depart, and, persisting in remaining, was ejected, for which he brought an action of trespass. Lord Denman, C.J., in giving judgment, said: "We agree that the question of title is not to be raised on a plea of possession. We agree also that this action is possessory, and that possession is sufficient for the plaintiff in trespass against a wrongdoer. But these elementary principles must be understood reasonably. A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession. Here, by the acquiescence of the plaintiff, the defendant had become peaceably and lawfully possessed as against him; he had re-entered by a trespass; if they had immediately sued him for that trespass, he certainly could not have made out a plea denying their possession. What he could not have done on the 1st of July he could as little have done on the 11th; for his tortiously being on the spot was never acquiesced in for a moment, and there was no delay in disputing it."

The conclusion to which I am brought by the above decisions is that the courts of law in England will lay the burden of proving title on the defendant in ejectment, if the plaintiff can show undisturbed and peaceable possession, acquiesced in or not disputed, for even so short a time as one year.

In the present case the Assistant Judge found on the evidence of a single witness that the plaintiff had possession

(*c*) 12 Ad. & E. 624.

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of the land. The evidence of that witness is to the effect that the plaintiff was warned off the land the instant he entered upon it; and, therefore, as he was treated as a trespasser from the first, it may well be doubted whether he ever had what the law understands by possession. I think that in a court of law in England he would not be allowed to succeed without proving his title.

But we are not here to administer the law of England, but the law of India; and I am of opinion that the latter law requires that in actions of ejectment we should always enforce the ordinary rule, that a plaintiff must recover by the strength of his own legal title. My reason is that the law of this country gives to a person who is dispossessed of property a remedy which the law of England does not provide; and that if he does not choose to avail himself of this remedy, he has no claim to the advantages which it would have secured to him.

Sec. 15 of Act XIV. of 1859 provides that "if any person shall, without his consent, have been dispossessed of any immoveable property otherwise than by due course of law, such person, or any person claiming through him, shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof, notwithstanding any other title that may be set up in such suit; provided that the suit be commenced within six months from the time of such dispossession. But nothing in this section shall bar the person from whom such possession shall have been so recovered, or any other person, instituting a suit to establish his title to such property, and to recover possession thereof, within the period limited by this Act."

We have here an exact reproduction of the provisions of the Roman Civil Law, the only difference being that under that law the period of limitation was not six months, but one year. A person who had been dispossessed of property had a right to an *interdictum de vi*, under which he might recover the property on the ground of possession only; but if he allowed a year to elapse without claiming this remedy, he was con-

sidered to have lost his possession; and, though he retained his action for the property, he was bound in such action to make out his title (Domat's Civil Law, ss. 2144, 2175). Under a similar law we should, I think, apply the same principle. The law has fixed a period of limitation within which a party may recover possession without proof of title. If he allow that period to elapse, he must prove his title.

I may make a remark, in passing, which has reference to what I have said regarding trespassers. A person could not obtain the *interdictum de vi* unless he had had juridical possession: "*Ne id quidem satis est, nisi docet ita se possedisse ut nec vi, nec clam, nec precario possederit*" (Cicero pro Cæcinâ, c. 32). Thus a mere trespasser could not have succeeded; nor could he, in my opinion, succeed under Sec. 15 of Act XIV. of 1859. He has never acquired what the law understands by possession, and cannot, therefore, have been dispossessed.

If the view which I have adopted be correct (and in support of it I may refer to a decision of the Calcutta High Court in *Kalee Chunder Sein and others* v. *Adoo Shaikh and others*) (*d*), a party who might have shifted the burden of proof, if he had proceeded under Sec. 15 of Act XIV. of 1859, cannot, if he let slip that opportunity, obtain the same advantage in an action of ejectment. The issue in such an action must always be, Has the plaintiff proved his title? I do not say that mere possession without further proof may not be sufficient to decide that issue in a plaintiff's favour. Possession is evidence of title, more or less strong according to its duration; and a court may well be justified in allowing a plaintiff to recover on such evidence only. But if he be allowed so to recover, it is on the ground that he has produced sufficient proof of title, and not on the ground that he has a right to recover without proof of title, because possession is good against all the world except the real owner. Whatever the decision may be, it is a decision on evidence, and involves no error of law cognisable in special appeal.

(*d*) 9 Calc. W. Rep., Civ. R. 602.

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In the present case the Judge required the plaintiff to prove his title, and, considering that such possession as the plaintiff had had, coupled with the other evidence produced by him, was insufficient to establish his title, he disallowed his claim. This is a decision on evidence, and, no error in law being shown, we cannot interfere with it.

I would confirm the decision with costs.

LLOYD, J.:—As regards the nature of the possession necessary to sustain an action under Sec. 15 of the Limitation Act, I do not think it expedient to go as far as my learned colleague. The question does not arise in the present suit, and it seems to me undesirable to express an opinion thereon till it comes directly before the court. With this reservation I fully coincide with the views expressed by Mr. Justice Melvill, and agree in confirming the decree of the lower court.

MELVILL, J.:—I feel the force of what Mr. Justice Lloyd has said, and admit that, as a rule, it is not desirable that we should express any opinion on a question not judicially before us. But as decisions in possessory suits under Sec. 15 of Act XIV. of 1859 are not open to appeal, we have no opportunity of expressing a judicial opinion as to the law relating to such suits. I believe that my colleagues generally concur with me in thinking that the Mámlatdárs, by whom such suits are ordinarily tried, have very vague and confused ideas of the law bearing on the subject; and I venture to think that it is not undesirable to make such remarks as, though not authoritative, may induce those officers to understand more clearly what it is which they are called upon to decide.

Decree confirmed.

Special Appeal No. 300 *of* 1869. 1870. August 17.

FRA'MJI HORMASJI.....*Appellant.*

THE COMMISSIONER and DEPUTY COMMISSIONER OF CUSTOMS, SALT, and OPIUM...*Respondents.*

Omnia præsumuntur contra spoliatorem—*Salt thrown overboard to avoid measurement—Salt removed in excess of Permit—Confiscation—Interest—Damages.*

Applying the maxim "*omnia præsumuntur contra spoliatorem,*" the High Court held that, where a vessel was seized on suspicion of having a greater quantity of salt on board than was allowed by its permit, and immediately afterwards a number of men boarded the boat, and, with the assistance of the agent of the owner, threw a considerable quantity of salt overboard, a presumption arose that there was an excess of salt on board at the time of the seizure beyond the amount allowed by the permit.

Where, under a permit to pass a certain number of *mans* of salt on which duty has been paid, an amount in excess of such number is removed, the whole of such salt must be considered as removed contrary to the provisions of the Salt Acts (Act XXVII. of 1837 and Act XXXI. of 1850), and the whole of such salt, and not merely the excess, is, under these Acts, liable to confiscation.

Interest should not be awarded on unliquidated damages.

THIS was a special appeal from the decision of A. Bosanquet, District Judge of Thánáá, in Appeal Suits No. 463 and 483 of 1868, confirming the decree of A. Lyon, Assistant Judge.

The facts of the case fully appear from the judgment of the Court.

The appeal was argued before WESTROPP, C.J., and LLOYD, J., on the 15th of June 1870.

Anstey (with him *Shántárám Náráyan*) for the appellant.

The Acting Advocate General (*the Honorable A. R. Scoble*) (with him *Dhírajlál Mathurádás*, Government Pleader) for the respondents.

Cur. adv. vult.

August 17th. WESTROPP, C.J.:—This suit was brought to recover Rs. 939-0-6, the alleged value of certain salt confiscated by the Deputy Commissioner of Customs, under the

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order of the Commissioner of Customs, by the authority of the Bombay Government, and Rs. 60-10-0 interest. The facts, as found by the Assistant Judge at Tháńá, and subsequently, on appeal, by the District Judge also, were substantially the following:—

On the 15th of March 1867 a boat of about 707½ *maṇs'* burden, and of which Dharmá Rámji was master, or tindal, was laden, on behalf of the plaintiff, with salt, at certain Government salt-works, under a permit for 520 *maṇs*. The whole of the salt on board was contained in two tanks lined with matting. The boat arrived at Kalyán on the 18th of March, and was then seized by the Custom House officers, on suspicion of having a greater quantity of salt on board than was allowed by the permit. Almost immediately after this seizure, a number of Mussalmáns boarded the boat, and, with the active assistance of Dharmá Rámji, the master, threw a considerable quantity of the salt overboard. Subsequently the salt remaining on board was weighed, and ascertained to be 501 *maṇs*, namely, 19 *maṇs* less than the quantity for which the permit had been given, all of which, 501 *maṇs*, were confiscated, as already mentioned. The Assistant Judge treated the tindal, Dharmá Rámji, as the agent of the plaintiff, and, acting upon the maxim *omnia præsumuntur contra spoliatorem*, held that there was an excess of salt on board to the extent of 187½ *maṇs* beyond the amount, 520 *maṇs*, allowed by the permit to be carried—187½+520 being equal to 707½, the burden of the boat. He also held that the excess only was liable to confiscation, and awarded damages to the plaintiff for the difference between 187½ *maṇs* and 501 *maṇs*, the amount left in the boat after the barratrous and fraudulent jettison, namely, 313½ *maṇs*, at Rs. 1-13-6 per *maṇ*. He further gave to the plaintiff interest upon the damages, and costs. On appeal to the District Judge, he affirmed the decree of the Assistant Judge.

The plaintiff, insisting on compensation for the whole 520 *maṇs* mentioned in the permit, has brought the present special appeal against the decree of the Judge. He states his grounds of appeal thus:—

(*a*) "The lower court held that the confiscation of the salt was authorised by law, whereas it was not so."

(*b*) "The lower court held, without any evidence whatever, that there was an excess in the salt laden in the boat over and above the quantity mentioned in the permit held by the appellant."

(*c*) "Even supposing that there had been such excess, the lower court held, without any evidence, that the appellant's salt contained in the boat was liable to confiscation, although protected by the said permit from such confiscation."

(*d*) "The lower court held that the tindal of the boat was the agent of the appellant, as carrier of more than the salt mentioned in the permit, and put on board by the appellant, there being no evidence that the excess of salt was loaded by, or on behalf of, the appellant; and thereupon ruled that the appellant was responsible for the act of the tindal in throwing salt overboard."

(*e*) "The lower court applied the maxim relating to presumptions against spoliation, to the prejudice of the appellant, although, 1*st*, the only salt he claims was duty-paid salt, and not liable to confiscation; 2*ndly*, he did not take part in the spoliation; and 3*rdly*, the tindal had no connection with the appellant further than as carrier of the duty-paid salt."

The defendants have also lodged certain objections to the Judge's decree, namely:—

1. "The Judge was wrong in holding that the Governor in Council could not order the confiscation of the entire bulk, in cases where smuggled salt, and salt on which duty has been paid, are mixed up in one undistinguishable mass."

2. "The Judge has departed from the provisions of Act XXVII. of 1837, and Sec. 4 of Act XXXI. of 1850, in holding that the Government were entitled to confiscate only the excess of salt over and above the quantity for which a permit had been obtained.

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3. "The Judge was wrong in allowing interest on damages."

The objection that there was no evidence of agency of the tindal on behalf of the plaintiff, either in lading the vessel with salt beyond the quantity sanctioned by the permit, or in getting rid of that excess by throwing some of the salt overboard, is not, in our opinion, sustainable. The evidence shows that the tindal, Dharmá Rámji, received the salt on board for the plaintiff and conveyed it to Kalyán, and actively assisted in throwing a portion of it overboard at Kalyán, after the boat had been seized on suspicion by the revenue authorities. The Sir-Kárkún of Ghorbandar, Mádhavráv Bápáji, one of the plaintiff's witnesses, has deposed that Dharmá Rámji paid the duty on the 520 *maṇs* mentioned in the permit. Under such circumstances, it is impossible successfully to maintain that there was not any evidence of agency. There having been some evidence of agency, it was for the courts below to say whether or not it was sufficient. The Assistant Judge has found, and the Judge, whose finding is conclusive upon this court in special appeals on a question of fact, has concurred with him, that the tindal was the agent of the plaintiff in what occurred. Were it necessary for us to express an opinion upon that finding, we should not dissent from it. There was not any evidence of salt having been laden on board the vessel for anybody but the plaintiff. Nor does he, in the course of this case in the courts below, appear to have suggested that salt belonging to anybody but himself had been shipped on board.

We think also that the courts below were quite right in applying the maxim *omnia præsumuntur contra spoliatorem* to the act of the plaintiff, by his agent the tindal, and those who assisted him in throwing the salt overboard. In Sir William Oldnall Russell's treatise on Crimes and Misdemeanours (Vol. III., p. 217, 4th ed.) the rule is rightly laid down thus:—"Where a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise that, if the truth had appeared, it would have been against his interest, and

that his conduct is attributable to his knowledge of this circumstance." This is so at Common Law: *Armory* v. *Delamirie* (*a*), cited by the Assistant Judge; *Mortimer* v. *Cradock* (*b*); *Lawton* v. *Sweeney* (*c*); *Crisp* v. *Anderson* (*d*), and also, in Equity, *Childrens* v. *Saxby* (*e*); *Wardour* v. *Berisford* (*f*); *Sanson* v. *Romsey* (*g*); *Cookes* v. *Hellier* (*h*); *Delany* v. *Tenison* (*i*); *Dalston* v. *Coatsworth* (*j*) (in which some valuable cases are collected); *Gartside* v. *Ratcliff* (*k*); and also in Admiralty Prize Law—*The Johanna Emilia* (*l*), and *The Hunter* (*m*), in which latter case Lord Stowell said: "It is certain that, by the law of every maritime court of Europe, spoliation of papers not only excludes further proof, but does, *per se*, infer condemnation, founding a presumption, *juris et de jure*, that it was done for the purpose of fraudulently suppressing evidence, which, if produced, would lead to the same result; and this surely not without reason, although the lenity of our code has not adopted the rule in its full rigour, but has modified it to this extent, that, if all other circumstances are clear, this circumstance alone shall not be damnatory, particularly if the act was done by a person who has interests of his own that might be benefited by commission of this injurious act. But though it does not found an absolute presumption *juris et de jure*, it only stops short of that, for it certainly generates a most unfavourable presumption. A case which escapes with such a brand upon it is only saved so as by fire. There must be that overwhelming proof, arising from the concurrence of every other circumstance in its favour, that forces a conviction of its truth, in spite of the powerful impression which such an act makes to its entire reprobation." The question which Lord Stowell then put to himself was—"whether, with the advantage of all the evidence that has been admitted, it"

(*a*) 1 Stra. 504; S. C. 1 Sm. L. C., 3rd ed., 151.
(*b*) 12 L. J. C. P. 166; S. C. 7 Jur. 45. (*c*) 8 Jur. 964.
(*d*) 1 Stark. R. 35. (*e*) 1 Ver. 207. (*f*) *Ibid.* 452.
(*g*) 2 Ver. 561. (*h*) 1 Ves. Senr. 235, per Ld. *Hardwicke*.
(*i*) 3 Bro. P. C. 659. (*j*) 1 P. Wms. 731.
(*k*) 1 Chan. Ca. 292. (*l*) 18 Jur. 703, 705, per Dr. *Lushington*.
(*m*) 1 Dods. 480, 486.

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(the case before him) "answers the description of a case in which an unfortunate act of spoliation occurs, but which, in all other respects, wears the aspect of perfect sincerity and truth." He came to a conclusion in the negative, and allowed the presumption against spoliation to prevail, as the act of spoliation had not been satisfactorily accounted for.

In the present case, although evidence has been adduced on behalf of the plaintiff, no attempt whatever has been made, in that evidence, to account for or excuse the act of spoliation, namely, the destruction of a considerable portion of the salt by throwing it overboard. Putting aside the possibility that the small-salaried Government servants at the salt-works, at which the boat had been laden, had found it worth their while to connive at a larger quantity of salt being shipped than was covered by the permit, "it appears," the Assistant Judge remarked, "from the evidence, that there are several salt-works along the creek by which the boat came; and that there would not be any great difficulty in clandestinely removing salt from any of them." We have already noticed that there was no evidence of salt belonging to any other person but the plaintiff being on board the boat, so as to admit of any attempt to shift the responsibility from himself to any other shipper of salt. In making that observation we are not to be understood as giving any opinion whether the fact of there being salt on board belonging to another person could, or could not, affect the question as to the liability of the plaintiff's salt to confiscation. (*See* upon a similar point on Bengal Reg. X. of 1819, *In re Ram Rana Beoparee*, I. S. D. A. Sum. Cas. Pt. I., 5, and Morley Dig. N. S., p. 372, tit. "Salt.") There were several persons engaged in assisting Dharmá Rámji in throwing the salt overboard. Ghulám Husen, a customs lascar, says that they threw it overboard with their hands and pieces of board, and did so for five or ten minutes; and Vináyak Krishṇa says that 501 *maṇs* were afterwards found in the boat. There manifestly were ample means and time to throw overboard more than 19 *maṇs*. We think that there were not any facts in this case to countervail the presumption arising from the act of spo-

liation, that there were more than 520 *maṇs* of salt on board the boat before the throwing over commenced, and, therefore, that the lower courts were perfectly justified in holding that there were more than 520 *maṇs* on board the boat. We think it unnecessary to carry the presumption any further, or to undertake to ascertain the extent of that excess. Our reason for so saying is that we do not agree with those courts in holding that the excess only was liable to confiscation. It is true that neither penal laws, nor revenue laws, where clauses inflicting pains and penalties are ambiguously or obscurely worded, are to be extended by construction. In such cases the interpretation is ever in favour of the subject, "for this plain reason," said Heath, J., in *Hubbard* v. *Johnstone* (*n*), "that the legislature is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed." Neither, however, is it true, as it has been sometimes put, that the court, in the exposition of such statutes, are to narrow the construction. "We are to look to the words in the first instance," said Buller, J., in *Rex* v. *Hodnett* (*o*), "and where they are plain we are to decide on them. If they be doubtful, we are then to have recourse to the subject-matter."

Act XXVII. of 1837 regulates the manufacture of salt within the territories subject to the Government of the Presidency of Bombay, and the duty leviable thereon, and the removal of the salt. The fourth section provides for the prevention of the removal of the salt until the duty thereon has been paid. The fifth section provides for the giving of a receipt and order by the Collector (pursuant to a form annexed to the Act), "which receipt and order shall specify the amount of duty paid, and the quantity of salt which the person who has paid that duty is entitled to remove, and the place whence, and the person to whom, that quantity of salt is to be delivered." The sixth section enacts that a part of that receipt or order shall be torn off and detained by the officer stationed at the salt-works, and that the remaining part shall be delivered "to the person who removes

(*n*) 3 Taunt 177. (*o*) 1 T. R. 96.

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the salt; and the part of the receipt and order so delivered to the person removing the salt, shall be a pass authorising the removing of that salt." The seventh section provides for the establishment by Government of *choukis* near the salt-works, and authorises "any of the officers stationed at such *choukis* to stop and detain *any salt* which is removed otherwise than in conformity with the foregoing rules, and to search any load which may pass any such *chouki* and which may be suspected to contain salt, and to take and cancel every pass under which salt shall be suffered to pass." The ninth section enacted "that it shall be lawful for the Collector of a District to direct the confiscation of *any salt which may have been removed from any works within that district otherwise than in conformity with the foregoing rules*, or which is found clandestinely stored for the purpose of evading the duty imposed by this Act."

Upon these sections we are clearly of opinion that if, under a permit or pass to remove 500 *maṇs*, on which duty for that quantity only had been paid, 700 *maṇs* were removed, the whole 700 *maṇs* must be considered as removed "otherwise than in conformity with the foregoing rules," namely, the provisions of the Act. There is nothing in the Act to divide such a transaction into two transactions, one lawful and the other unlawful. To us it appears to be one single and indivisible transaction to remove in one boat 700 *maṇs*, where duty has been paid upon, and permission given to remove, 500 *maṇs* only, and that that transaction is a fraud upon the revenue.

But the case for the Crown does not rest upon that enactment alone.

Act XXXI. of 1850, entitled "an Act for protecting the Salt Revenue in Bombay," by Secs. 1 and 2, provided for the levy of customs duty on salt passing into or out of foreign settlements or territories, at the same rate as the excise duty leviable on salt within the territories subject to the Presidency of Bombay. Sec. 3 rendered any person concerned in passing salt, either by land or sea, contrary to the provisions of this or any other Act, liable to certain punishments. Sec.

4 is as follows:—"*All salt* passed, or attempted to be passed, or removed, contrary to the provisions of this *or any other Act*, and all vessels, carriages, and animals used in so passing or removing such salt, and the contents of any package in which such salt may be concealed, shall be liable to confiscation at the discretion of the Governor of Bombay in Council, but may be redeemed on payment of such fine as the Governor in Council, or any officer or officers of the Revenue Department to whom the Governor in Council shall think fit from time to time to delegate this power, may think reasonable." That section renders all salt passed, or attempted to be passed, or removed, contrary to the provisions of this or any other Act, and, consequently, contrary to the provisions of Act XXVII. of 1837, liable to confiscation. We have already said that we consider that a removal of 700 *maṇs* under a permit for 500 *maṇs*, on which latter quantity, only, duty had been paid, would be a removal of the whole 700 *maṇs* otherwise than in conformity with the provisions of that Act. We, therefore, think that such a removal would come within Sec. 4 of Act. XXXI. of 1850, which goes even further than Act XXVII. of 1837, Sec. 9, by rendering liable to confiscation not only the salt, but also the vessels, carriages, and animals used in passing or removing it, and the contents of any package in which such salt may be concealed. This latter provision, as to the confiscation of vessels, animals, and carriages used in the removal, and of the contents of any package in which the salt may be concealed, repels any supposition that the Legislature intended to sever the excess from the rest of the salt. We do not refer to that latter provision with a view to uphold the argument suggested, but discarded in the courts below, that the word "package" meant duty-paid salt packed with smuggled salt, but because the inclusion of vessels, carriages, and animals used in the passing of the salt, and the contents (even assuming that they were not salt) of any package in which salt is concealed, indicates clearly that the intention of the Legislature was that the confiscation should be general, and not limited to the excess.

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We, therefore, reverse the decrees of the Judge and Assistant Judge in this case, whereby they gave damages to the plaintiff, in respect of the difference between the excess and the quantity found on board of the vessel, and we direct that judgment be entered for the defendants with costs.

We think it right to say that, even if we were of opinion that, so far as regards damages, the decrees of the courts below could have been sustained, we should have disallowed the interest awarded by them, inasmuch as interest does not run upon unliquidated damages.

LLOYD, J., concurred.

Decree reversed and judgment entered for defendants, with costs.

NOTE.—In Special Appeal No. 301 of 1869 (Ali Saheb wullud Shurfoodin Hossein, a shipper of salt, against the same defendants), the facts were nearly the same as in the above-reported case, the evidence as to the amount of salt thrown overboard being somewhat stronger, as it appeared that salt to more than three feet in depth was thrown over. The Courts below applied the maxim, *omnia præsumuntur contra spoliatorem*, and, further, being of opinion that there was not any evidence to show that the boat could not contain salt to the full amount covered by the permit, namely, 720 *mans*, in addition to 672 *mans*, the amount of salt found in her after the jettison had taken place, presumed that the whole 720 *mans* was excess, and gave judgment for the defendants with costs. Their decree was, on the 17th of August 1870, affirmed by the High Court, but on the same grounds as those given in the judgment of the Chief Justice above reported, namely, that the Court would, from the fact of the throwing overboard of a considerable quantity of salt under the circumstances in evidence in the case, presume that there was an excess of salt on board, beyond the quantity sanctioned by the permit, and that, whatever the extent of that excess might be, the whole of the salt in the boat was liable to confiscation.

Decrees given by the courts below in the actions out of which Special Appeals Nos. 282, 284, and 296 of 1869 arose, were, on the same day, affirmed by the High Court. Those were actions brought against the same defendants by the owners of three boats confiscated in the same manner, and on the same occasion, as the salt. The courts below upheld the legality of the confiscation, under Act XXXI. of 1850, Sec. 4. It appeared that the plaintiffs themselves in all these cases had been actually engaged in throwing the salt overboard. The courts below, applying the same maxim, *omnia præsumuntur*, &c., gave decrees for the defendants.

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Special Appeal No. 99 *of* 1870.

BALA'VA' kom BASANGOUDA' .....*Appellant.*
SHIDGOUDA' valad KADA'PA' .....*Respondent.*

Civ. Proc. Code, Sec. 32—*Cause of Action—Dismissal of Claim—Declaratory Decree.*

Whenever in the progress of a cause it appears that no cause of action has accrued to the plaintiff, his claim must be dismissed.

A declaratory decree will not be passed in favour of a plaintiff unless the defendant has done some act which interferes with the enjoyment by the plaintiff of the subject-matter in respect of which the suit is brought.

THIS was a special appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge, Full Powers, at Kaládgi, in Appeal Suit No. 112 of 1869, reversing the decree of the Munsif of Mudebehál.

The plaintiff sued to obtain a declaration of her right to the enjoyment of certain honorary privileges as second in rank of the páṭíls of the village of Bágiwáḍi, alleging that she was obstructed in her enjoyment by the defendant.

The defendant answered that the claim was barred by the statute of limitations.

The Munsif was of opinion that although the suit was barred by the law of limitation the defendant had waived that objection in his examination; and, going into the merits of the case, gave a decree declaring the rights of the litigants as between themselves and the head páṭíl and kulkarṇi of the village.

The plaintiff appealed from the Munsif's decree, and sought to have it amended.

The defendant neither preferred a cross-appeal nor took any objections.

The court of appeal raised three issues for determination, namely: (1) Is the suit barred by limitation; (2) Has the plaintiff proved any cause of action; and (3) Has the plaintiff proved satisfactorily the rights and privileges claimed.

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On the first issue the finding of the court was in favour of the plaintiff; on the second and third it was against her. The Assistant Judge said "my object in raising the second issue was to ascertain whether the plaintiff is entitled to a declaratory decree at all. The suit refers to ten different rights and privileges, each to be exercised at different seasons of the year, and one of them can only be exercised every two or three years, when there happen to be five Mondays in the month of Shrávaṇ. I was, therefore, astonished to find the plaintiff fixing the date of her cause of action for the 8th of October 1867, as if the defendant had obstructed her on that one day in the exercise of all her privileges; and it struck me that with regard to most of the privileges claimed the defendant had probably never interfered with the plaintiff; and that, therefore, the plaintiff would not be entitled to a declaratory decree. That in order to obtain a declaratory decree 'the parties must be at arm's length, and that there must be a contest between them,' is clearly shown by the general tenor of the decisions collected in the note to Sec. 15 of Broughton's Code of Civil Procedure, 3rd edition, 1869, in one of which Justice Phear used the very words which I have quoted. In a case of this sort, therefore, I have no doubt that a suit for a declaratory decree should be rejected, unless it is shown to the court's satisfaction that the plaintiff and defendant have had actual disputes leading to continued misunderstanding with respect to these rights."

Mr. Naylor then found that the defendant had not obstructed the plaintiff's enjoyment, and was, therefore, of opinion that the plaintiff's claim should be thrown out. He said :—

"The difficulty which besets me, however, is that I am only trying an appeal brought by the plaintiff for the amendment of the decree. The defendant has put in no cross-appeal; therefore, unless for the plaintiff's appeal, the lower court's decree would have remained unaltered. The question is whether on the plaintiff's own appeal the court can, or should, reverse the decree as far as it is in her favour.

In accordance with the ruling in Special Appeal No. 665 of 1863 (2 Bom. H. C. Rep., p. 169), I am bound, I think, to raise and determine the issues necessary for the proper decision of the suit, although the parties may not raise them by their pleadings; and as the decree is not one that I can in any way amend without passing such a decision as I think ought not to be given, I see no other resource but to reverse the Munsif's decree and throw out the plaintiff's claim."

The special appeal was argued before GIBBS and KEMBALL, JJ.

Dhirajlál Mathurádás for the special appellant.

Nánábhái Haridás for the special respondent.

GIBBS, J., in delivering judgment, after recapitulating the facts of the case, said:—The Senior Assistant Judge finds distinctly that no opposition or obstruction was at any time caused by the defendant, and that, therefore, there is no cause of action. In the words of Mr. Justice Phear, "the parties must be at arm's length, and there must be a contest between them." Mr. Nánábhái quoted Sec. 350 of the Code of Civil Procedure to show that an appellate court could either confirm, reverse, or modify a decree; that the decree, being bad, could not be confirmed; that, there being no cause of action, it did not admit of any modification, and that, therefore, there was no resource left but to reverse it. This section, we think, does not apply, but another section, namely, Sec. 32, and the case of *Sáluji Kesráji* v. *Rájsangji Jálamsangji* (*a*), do apply. Couch, C. J., there says: "Sec. 32 directs that if upon the face of the plaint, or after questioning the plaintiff, it shall appear to the court that the subject-matter of the suit does not constitute a cause of action, or that the right of action is barred by lapse of time, the court shall reject the plaint. The words are imperative, and appear to impose upon the court, before the defendant is called upon to state his defence, the duty of taking any objection that may exist in point of law to the

(*a*) 2 Bom. H. C. Rep. 162 (2nd edn.).

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plaintiff's claim, not merely apparent on the plaint, but which may be elicited by questioning the plaintiff."

We are, therefore, equally bound to dismiss the claim whenever it appears either that there is no cause of action, or that it is barred by limitation.

We, therefore, confirm the decree of the court below, with costs on the special appellant.

Decree confirmed.

July 28.

Miscellaneous Civil Application.

KA'SHINA'TH VITHAL, Vakíl, v. DA'JI GOVIND, First Class Subordinate Judge, Dhuliá.

Contempt of Court—Procedure—Crim. Proc. Code, Sec. 163—Act I. of 1846.

When a Civil Court omitted (as directed by Sec. 163 of the Code of Criminal Procedure) to call upon a person who was charged with contempt of court to make any statement he might wish to make in his defence, it was held that this irregularity was fatal to the order, and that the High Court would exercise its extraordinary jurisdiction, and reverse an order so made.

THIS was an application for the exercise of this court's extraordinary civil jurisdiction.

The facts appear from the judgment of the court.

The application was heard by GIBBS and MELVILL, JJ., on the 14th of July 1870.

Nánábhái Haridás and *Bhairávnáth Mangesh* appeared for the petitioner.

No one appeared on the other side.

GIBBS, J., said :—In this case Káshináth Vithal, a Pleader duly authorised to practise in the courts of the Khándesh district, appeals to us, under the extraordinary jurisdiction of this court, to set aside an order or sentence of the First Class Subordinate Judge of Dhuliá, Dáji Govind, who fined him Rs. 5, and which sentence or order was confirmed in appeal by the District Judge. The ground on which the case comes before us is that the First Class Subordinate

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Judge and the District Judge erred in law in fining the petitioner in the manner they did. We called for the record and proceedings, and heard the petitioner by his vakíl, Mr. Nánábháí Haridás. No one appeared in support of the order, and we have, therefore, to consider the matter *ex parte*.

It appears from the proceedings that the Pleader, while conducting a case before the Subordinate Judge, pressed a question on the attention of the court, and desired that it might be put. The Subordinate Judge refused to put the question. Instead of being satisfied, the petitioner reiterated his demand, and insisted on a note of it being placed on record. The Subordinate Judge refused to do this, and there and then fined the Pleader Rs. 5, and in the proceedings stated that he did so for making a *takrár* (objection) in court, under the provisions of Act I. of 1846. The Honorable Mr. Hobart, the District Judge, to whom an appeal was made, was of opinion that the Subordinate Judge was wrong in fining the petitioner under Act I. of 1846. He states in his finding, after having arrived at the conclusion that the circumstances mentioned by the Subordinate Judge constituted an insult and a contempt, that "to continue to urge that the question was a proper one, after the decision of the court that it was not, was of the nature of at least an interruption to the proceedings of the court, and was punishable under Sec. 228 of the Penal Code; and I must take it, for the purpose of this appeal, that the appellant acted as stated in the Subordinate Judge's order, and the reasons for passing the order. I think the appellant rendered himself liable to fine for having so acted." Mr. Hobart then notices that the Subordinate Judge did not proceed regularly in the infliction of this fine. He ought, he said, to have adopted the procedure prescribed in Sec. 163 of the Criminal Procedure Code, and not to have omitted to record any statement the offender might have made. He did not record that he called for any statement from him; but, as no satisfactory explanation was offered in the appeal of the appellant's conduct, he considered that Sec. 439 of the Criminal Procedure Code prevented his setting aside the proceedings, as there did not appear to have been a failure of justice.

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The above are the facts of the case.

I will now proceed to consider the order of the Subordinate Judge. Referring to Act I. of 1846, we find that the only section to which we need turn our attention is the 10th, which says—"And it is hereby enacted that whenever a Pleader has rendered himself liable to a fine in the court of a Principal Sudder Ameen [who corresponds with the present First Class Subordinate Judge], or Sudder Ameen, it shall be competent to such Principal Sudder Ameen, or Sudder Ameen, to impose such fine: Provided that an appeal from all orders imposing such fines shall lie to the Zilla or City Judge, whose decision thereon shall be final." We have, therefore, to see under what circumstances a Pleader may render himself liable to a fine in the court of a First Class Subordinate Judge; and this leads us to refer to the only Regulation regarding Pleaders, namely, Reg. II. of 1827, Ch. VI. We there find that the only circumstances under which a Pleader can be fined are mentioned in Sec. 50, cl. 3, Sec. 51, cl. 2, and Sec. 54, cl. 1. Sec. 50, cl. 3, says: "If after receiving the retaining fee a Pleader shall engage with, or act for, the other party, or refuse or omit to act on behalf of his client, he may be punished by a fine not exceeding Rupees five hundred." Sec. 51, cl. 2, enacts that "it shall be incumbent on a Pleader, at the time of receiving any accounts, writings, or documents from his client, to give a written receipt for them, and to restore them when required, under penalty of a fine not exceeding Rupees one hundred." Sec. 54, cl. 1, provides: "If a Pleader is unable to attend the court in consequence of indisposition or other necessary cause, he shall notify the same to the court in writing.....and any Pleader absenting himself without written notice as above prescribed may be punished by fine not exceeding Rupees one hundred." None of these sections apply to the present case; and, therefore, it appears that this Pleader has not rendered himself liable to a fine under Act I. of 1846, and the order of the Subordinate Judge was, therefore, wrong.

I now go to the order of the District Judge. He sees the error of the Subordinate Judge. He takes, and very properly,

the facts as stated by that officer, and finds that they constitute an offence under Sec. 228 of the Indian Penal Code. This section provides that "whoever intentionally offers any insult or causes any interruption to any public servant while such public servant is sitting in any stage of a judicial proceeding shall be punished....." Mr. Hobart was of opinion that the case, as put by the Subordinate Judge in the short proceedings which he drew up, came within these words; and he declined to interfere with the fine.

A difficulty, however, arose in the District Judge's mind. The proceedings before the Subordinate Judge were not conducted according to Sec. 163 of the Criminal Procedure Code; but the District Judge considered Sec. 439 of that Code prevented his interfering with the matter. This section runs thus:—"No trial held in any Criminal Court shall be set aside, and no judgment passed by any Criminal Court shall be reversed, either on appeal or otherwise, for any irregularity in the proceedings of the trial, unless such irregularity have occasioned a failure of justice." The irregularity in this case was the omission to call upon the accused to make a statement or put in a defence, so that even in a Criminal Court it would be a grave error; but the proceedings were in a Civil Court, and the section does not apply.

I now refer to Sec. 163; it runs thus:—"When any such offence as is described in Section 175, 178, 179, 180, or 228 of the Indian Penal Code is committed in the view or presence of any Civil, Criminal, or Revenue Court, it shall be competent to such Court to cause the offender, whether he be a European British subject or not, to be detained in custody, and, at any time before the rising of the Court on the same day, to take cognisance of the offence, and to adjudge the offender to punishment by fine not exceeding two hundred rupees, or by imprisonment in the Civil Jail for a period not exceeding one month, unless such fine be sooner paid." The order passed under this section is appealable, under Sec. 413, to the District Judge, whose order is final. The section then goes on to say that "in every such case the Court shall record the facts constituting the con-

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tempt, with any statement the offender may make, as well as the finding and sentence." No special appeal lies to us. The law makes the decision of the District Judge final, but we have a power, under Reg. II. of 1827, Sec. v., cl. 2, to call for the record of any case, and pass such order as we think right, and it is a question whether we should interfere in the present case. We must take the record as drawn up by the Subordinate Judge before whom the contempt was committed, and then see if there is reason to interfere. There is a somewhat analogous example in the action taken by the Privy Council in such matters, which may guide us.

We find this the highest court of appeal has lately had two cases of this nature before it. The orders in both those cases were passed by Courts of Record, which the court of the Subordinate Judge is not; and it is a much more delicate matter to deal with an order of a Court of Record than of a Subordinate Judge in this country. The first case is that of *Pollard* v. *The Chief Justice of Hongkong* (*a*), which was referred to by Mr. Nánábhái in course of his argument. There the Lords of the Privy Council reported that "their Lordships do agree humbly to report to your Majesty that, in their judgment, no person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him, and that in the present case their Lordships are not satisfied that a distinct charge of the offence was stated, with an offer to hear the answer thereto, before sentence was passed." This is almost *verbatim* the course laid down to be followed in Ch. X. of the Code of Criminal Procedure. Their Lordships went on to observe that they were not satisfied that any of the acts imputed to Mr. Pollard amounted to a contempt of court, or legally constituted an offence, and they, therefore, recommended Her Majesty to remit the fine imposed upon him.

The other case is that of *McDermott* v. *The Judges of British Guiana* (*b*). An important point was there argued, whether the Colonial Supreme Court was a Court of Record or

(*a*) Law Rep. 2 P. C. Ca. 106. (*b*) Ibid. 341.

not, and it was decided that it was. Lord Chelmsford, in giving judgment, notices several cases of contempt of court which had been before the Privy Council (but not, apparently, that of Pollard). In noticing the case of *Rainy* v. *The Justices of Sierra Leone* (*c*), his Lordship said that "it had been decided that it (the Recorder's court) is a Court of Record, and that the law must be considered the same there as in this country, and, therefore, the orders made by the court, in the exercise of its discretion, imposing fines for contempts, are conclusive, and cannot be questioned by another court; and we do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such orders." This at first sight appears contrary to the ruling in Pollard's case; but the two cases are not really antagonistic, for Lord Chelmsford goes on to observe that "not a single case is to be found where there has been a committal by one of the Colonial Courts for contempt, where it appeared clearly upon the face of the order that the party had committed a contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which this Committee has ever entertained an appeal against an order of this description." In noticing the case of *Smith* v. *The Justices of Sierra Leone* (*d*), Lord Chelmsford said "there was an order of the Recorder's court of Sierra Leone disbarring and striking off from the rolls a practitioner of that court for alleged contumelious conduct. But, in addition to this order, there was a distinct and separate one, ordering Mr. Smith to be fined and imprisoned for the same alleged contempt. Now, the mode in which the Committee dealt with those orders brings out the distinction as to the right to appeal in these cases in the clearest manner. Mr. Smith's petition was presented through the Secretary of State, and, after considerable delay, it was, by an Order in Council, referred to the Judicial Committee. Their Lordships in that case entertained the petition against the order for disbarring Mr. Smith and striking him off the roll, because they held that that was not an appropriate

(*c*) 8 Moo. P. C. 47. (*d*) 3 Moo. P. C. 361.

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punishment for a contempt of court. They took no notice of the order for imprisonment, which they seemed to consider to be in the same category with the fine; but with regard to the fine imposed by the court for contempt they held that they had no jurisdiction over it, and that they could not entertain the appeal." So the principle laid down by the Privy Council is clear, that no appeal lies from an order of a Court of Record punishing for contempt; but, nevertheless, the Privy Council will interfere where on the face of the proceedings it appears that there was no contempt, or that the accused was not called on to answer a charge specifically made, or that the punishment was not suitable for the offence.

Applying the principle so laid down by the Privy Council, we shall be justified in exercising our extraordinary jurisdiction, and interfering with the order of the Subordinate Judge in this case. If we had found here that the accused had committed contempt of court, and had been called up to state his defence, we should not have interfered; but as this latter procedure has been omitted, this is sufficient in itself to require us to reverse the order, and direct the fine to be repaid to the accused Pleader: and this will be the order of the court.

MELVILL, J., concurred.

Nánábhái Haridás:—Would your Lordships express any opinion as to whether a court is justified in dealing with a Pleader under Sec. 228 of the Indian Penal Code for the offence as stated by the Subordinate Judge in this case?

GIBBS, J.:—We are not called upon to decide that point.

Order reversed.

Referred Case.

1870.
August 2.

CHOTA'LA'L JAMNA'DA'S .....*Plaintiff.*
BULA'KIDA'S JETHA' .....*Defendant.*

Stamp—New Trial—Small Cause Court.

A petition for a new trial in a Small Cause Court is, under the Court Fees Act (VII. of 1870), properly stamped with a one-anna stamp.

CASE referred for the opinion of the High Court by Gopálráv Hari Deshmukh, Judge of the Court of Small Causes at Ahmedábád :—

"Is a petition for a new trial in a Small Cause Court required to be written, under the Court Fees Act (VII. of 1870), on a paper of the value of one half of the fees leviable on the plaint according to Art. 5 of Sch. I. ?

"The case in which this question arose was decided in favour of the defendant, and the plaintiff has made a petition for a new trial on a stamped paper of one anna, and the preliminary question is whether it should be received or not. The plaintiff in his petition states that a petition for a new trial is not specified in the Court Fees Act, and that Arts. 4 & 5 of Sch. I. of the Act refer to Sec. 377 of the Civil Procedure Code, as shown by the distinction they make between an application for review of judgment made within, and after, ninety days. The petition for a new trial, therefore, falls under Art. 1 of Sch. II., and that it may be written on a stamp of one anna.

"My opinion is that petitions for new trials should be considered as coming under Art. 5 of Sch. I. of the Court Fees Act."

PER CURIAM (GIBBS and MELVILL, JJ.) :—The Court is of opinion that an application for a new trial under Sec. 21 of Act XI. of 1865 is distinct from an application for a review of judgment, and that it falls within Art. 1 of Sch. II., and not within Art. 5 of Sch. I., and that a one-anna stamp is sufficient.

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August 2.

Referred Case.

TEJRA'M JAGRUPA'JI .....*Plaintiff.*
KUSA'JI bin GA'NGJI *et al.* .....*Defendants.*

Attachment—Salary—Government Servant.

The whole salary of a peon in the service of a Mámlatdár under Government is liable to attachment as it becomes due.

CASE referred for the opinion of the High Court, under Sec. 22 of Act XI. of 1865, by Janárdhan Vásudevji, Judge of the Small Cause Court at Puṇá :—

"The plaintiff applied for execution of a decree he had obtained against the defendant, who is a peon in the office of the Mámlatdár of Máwal táluká, by attachment of his salary. The questions for decision are (1) whether the salary of a Government servant is attachable in execution of a decree, and, if so, (2) whether the attachment can be continuous until the decree is satisfied; and (3) whether the whole salary, or a portion of it only, should be attached.

"As regards these questions, the late Ṣadr Adálat held that salary was not attachable as such, but only after it had become a debt (Circular No. 273, Opinion on Sec. 237 of Act VIII. of 1859).

"That opinion, however, is not a judicial ruling, and, as I have doubts regarding it, I submit this reference, in order that the point may be authoritatively determined."

"It is true that salary is not specifically mentioned in the enumeration of property declared, under Sec. 205 of Act VIII. of 1859, to be liable to attachment, but it by no means follows, therefore, that it is exempt from attachment. The contrary is, I think, the inference to which the words 'all other property whatsoever,' used in that section, are calculated to lead, in the absence of an express provision for the exemption; for although salary is not a thing *in esse*, still it is a thing *in potentiâ*, and as such it is as much property as anything else. This inference derives confirmation from the circumstance that a special provision has been made in a

recent enactment for the exemption from attachment of the pay and allowances of men enlisted in the native army: Act V. of 1869, Part III., para. *b*. For the Legislature would not have seen any necessity for this special provision if, by the absence of a specific mention of salary in Sec. 205 of the Code of Civil Procedure, it had intended to exempt from attachment the salaries of Government servants generally. I, therefore, think that execution can issue against the salary of a Government servant before it actually becomes due, and that it may continue in force until the decree is fully satisfied. I am, however, of opinion that the attachment should not extend to the whole of the salary, but to a portion only, say one-third, as was the practice before the introduction of the Code: as, if the whole salary be attached, the servant will be left without any means of subsistence, and inconvenience may thence result to the public service."

PER CURIAM (GIBBS and MELVILL, JJ.):—The Court declines to decide the first question in such a general form. We are of opinion, however, that there is no reason why the salary of an official, such as the judgment-debtor in this case, a peon, should not be attached. With reference to the second question, the salary cannot be attached prospectively, but can only be attached as it becomes due; and further, if the application be made for the whole pay to be attached, the whole must be attached.

Special Appeal No. 224 *of* 1870.

August 25.

ENDAR LA'LA' and DAYA' KHUSHA'L... *Appellants.*
LALLU HARI *et al.* ..... *Respondents.*

Tenancy—Presumption—Yearly Tenant.

When there is nothing to show on what tenure a tenant holds from his landlord, the presumption is that he is a yearly tenant.

THIS was a special appeal from the decision of C. G. Kemball, District Judge of Súrat, in Appeal Suit No. 256 of 1869, affirming the decree of the Subordinate Judge of Balsád.

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The plaintiffs, who were the heirs of Nichábhái Gopálji, instituted this suit to recover possession of certain land which had been let to the defendants for cultivation as yearly tenants, and to recover Rs. 45, being one year's rent of the land.

The defendants answered that they held the lands from the plaintiffs' ancestors for more than thirty years, and paid a fixed sum as rent for the land, exclusive of the Government assessment on the land. They contended that they were permanent tenants, and had a right to hold the land as long as they paid the fixed rent, and that the plaintiffs could not eject them, but could only claim the rent.

The Subordinate Judge of Balsád held that the defendants had failed to prove that they held the lands on a permanent tenure, and accordingly decreed possession to the plaintiffs, together with the net mesne profits for 1864.

The defendants appealed, on the ground that their long possession of the land at an invariable rent was evidence of their holding on a permanent tenure, and that the burden of proof was wrongly placed on the defendants, as it lay on the plaintiffs to establish their right to evict the defendants by showing that they were yearly tenants.

The District Judge, in affirming the decree of the Subordinate Judge, delivered the following judgment :—

"I find on the evidence of one of the defendants that they are admittedly tenants of the plaintiffs. The defendants admit further that they do not know on what terms they originally came into possession, and base their right to continue as against the plaintiffs upon the length of their tenancy. Looking to the relative position of the parties, and the fact that there is no evidence forthcoming of any special agreement defining the nature of their tenancy, the presumption which arises is that the defendants are annual tenants of the plaintiffs, and, that being so, the latter clearly have a right to recover, no matter for what period the tenancy may have lasted. The defendants admit that there

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was not, so far as they are aware, any special agreement of lease to rebut the legal presumption arising from the facts. I, therefore, affirm the decree of the lower court with costs."

The defendants appealed from this decision, and the appeal was argued before GIBBS and MELVILL, JJ.

Nánábhái Haridás, for the appellants, contended that possession for several generations raised a presumption of permanent tenancy, which the lessor should rebut, as there were in Gujarát a class of cultivators, called *japti khedu*, who held land on a permanent tenure. He cited and relied on the case of *Annáji Appáji* v. *Kási Atmáji* (*a*).

Shántárám Náráyaṇ, for the respondents:—In the case of *Annáji Appáji* v. *Kási Atmáji*, the Assistant Judge found that the rights of the defendant as occupant were contemporary with the plaintiff's rights as *inámdár*. The plaintiffs in this case own the land not as *inámdárs*, but as proprietors; that precedent, therefore, does not apply. The case of *Bái Gangá* v. *Dullabh Parág* (*b*) governs this case.

GIBBS, J.:—I sat in the case reported in the third volume, which is a Ratnágirí case, and there were local peculiarities in it which would not equally apply to other districts. In all ordinary cases the presumption of law is that a tenant is a tenant from year to year, unless a larger right can be shown by the evidence of a lease or agreement to that effect. In the case above quoted ninety years' possession was found, as also that the right of the occupants commenced simultaneously with the creation of the *inámdár's* rights, and the alleged lease was said to have been destroyed when a house was burnt. This is no precedent to govern the present case. The occupation here has only been for about thirty years, and the defendants rely simply upon their possession as conferring upon them a perpetual title. The presumption being that a tenant is a tenant from year to year, no length of possession by itself can confer a perpetual lease. Once a

(*a*) 3 Bom. H. C. Rep., A. C. J. 124.
(*b*) 5 Bom. H. C. Rep., A. C. J. 179.

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tenant, always a tenant, is the rule; and, unless there is evidence of a lease, the proprietor can oust after due notice. With regard to the objection about the want of notice, it was not urged below, and on referring to the exhibits we find that the defendants admit receipt of a notice. We are of opinion, therefore, that no presumption arises in this case of a perpetual tenancy; and we confirm the judgment of the court below.

Decree affirmed with costs.

Sept. 13.

Referred Case.

VENKA'JI LAKSHMAN DESHPA'NDE .....*Plaintiff.*
YAMUNA'BA'I, wife of Bháskarráv Deshpánde.....*Defendant.*

Jurisdiction—Small Cause Court—Hakwartana *Allowance.*

A suit by an alleged sharer in a *hakwartana* allowance to recover from the defendant, who received the whole of such allowance from Government, the plaintiff's share in it, was *held* not to be a suit cognisable by a Court of Small Causes.

CASE referred for the decision of the High Court by Trimalráv Vyankaṭesh, Judge of the Court of Small Causes at Hublí, under Sec. 22 of Act XI. of 1865:—

"Venkáji Lakshmaṇ brought this suit to recover from Yamunábái a fifth-share of a *hakwartana* allowance belonging to the *deshpánḍe watan* of their joint family, which fifth-share the plaintiff alleged he had received down to the year 1867-68, when the defendant, Yamunábái, in whose name the *watan* was entered in the Government books, as the head of the family, refused to pay the plaintiff his fifth-share of the allowance. The *hakwartana* allowance was payable by Government to the Deshpánḍe family. Down to the year 1867-68 the officers of Government deducted the amount of the allowance from the *judi* payment due from the members of the family, for the lands in their possession; but in that year the old practice was discontinued, and the Government paid the allowance to the defendant, who refused to pay to the plaintiff his fifth-share.

"The defendant answered that there was nothing due to the plaintiff, and that no share of the *hakwartana* allowance had ever been paid to him.

"I found, on the evidence of attested extracts from the general statements in the Dhárwár Collector's office, that the plaintiff's name is entered as a holder of a fifth-share of the *hakwartana* allowance standing in the name of the Deshpánde family. From the extracts of Government accounts it appears that the entire allowance has been paid to the defendant, in whose name the *watan* is entered in the Government books. From the evidence of witnesses who are members of the family, and who represent, along with the plaintiff and defendant, the five sharers in the *watan*, it appears that the family was divided long ago; that the allowance had been in former years deducted from the *judi* payment due for the lands in the possession of the family; and that in 1868-69 the entire allowance was paid by the Government to the defendant, Yamunábái, who had paid over to three of the sharers the shares due to them, but had not paid to the plaintiff his fifth-share of the allowance.

"Upon these facts I decreed for the plaintiff.

"The defendant's *vakíl* applied for a new trial, on the ground that Government had, since the institution of the suit, settled with the defendant, and fixed a cess of six annas in the rupee on the land, and had issued a *sanad* to the defendant; that the allowance was of the nature of immoveable property, and the suit was, therefore, one not cognisable by a Court of Small Causes, in accordance with the decision in Special Appeal No. 804 of 1865.

"Upon these grounds a new trial was granted.

"As regards the preliminary objection upon the point of jurisdiction, I am of opinion that the present suit is cognisable by a Court of Small Causes, and the decision in Special Appeal No. 804 of 1865 does not apply.

"Venkáji does not sue Yamunábái to establish his right to a fifth-share of the allowance as heir to any deceased member of the family. He seeks only to recover a fifth-share of

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a money allowance received by the defendant, not on her own account alone, but on account of all the sharers. He seeks to establish no new right which did not exist before, but simply to recover for the year 1868-69 what he had been receiving ever since 1851 to 1867-68. Moreover, no service has to be performed for this allowance; it is free from service, a money payment being made to Government in lieu of service.

"I submit this question of jurisdiction for the opinion of the High Court."

The reference was considered by GIBBS and MELVILL, JJ.

PER CURIAM:—The money claimed is not due on a bond or other contract, and it was decided in the case of *Keshavbhat* v. *Bhágirathibái*, S. A. No. 804 of 1865 (*a*), that "personal property," as used in Sec. 6 of Act XI. of 1865, must be limited to chattels moveable, and does not include claims to money other than those which are distinctly specified in the statute. The Court concurs in that decision, and is of opinion, on the above grounds, that this claim is not cognisable by a Court of Small Causes.

(*a*) 3 Bom. H. C. Rep., A. C. J. 75.

Sept. 20.

Referred Case.

VITHOBA' valad UKBA *et al.* .....*Appellants.*
CHOTA'LA'L TUKA'RA'M .....*Respondent.*

Mortgage—Destruction of Property mortgaged—Liability of Mortgagor—Hindú Law.

By the Hindú, as well as by the English, law, a creditor in whose hands a pledge has accidentally perished, is notwithstanding entitled to recover his debt, in the absence of an agreement to the contrary.

CASE stated for the decision of the High Court, under Sec. 28 of Act XXIII. of 1861, by Satyendra Náth Tagore, Assistant Judge of Khándesh:—

"The plaintiff brought this action to recover Rs. 150, payable under a mortgage bond dated the 14th of November

1863, mortgaging a house, which subsequently was accidentally burnt down.

"The defendant answered that the house mortgaged to the plaintiff had been burnt down through the plaintiff's negligence, and, as the plaintiff was not in a position to restore the house, according to agreement, that he, the defendant, was not liable.

"The Subordinate Judge of Amalner found that the mortgaged premises had been set on fire through the default of the plaintiff, and that, therefore, the suit would not lie.

"The plaintiff appeals, on the ground that the suit is maintainable.

"I found the facts of the case to be as follows:—

"The defendant on borrowing a sum of money from the plaintiff gave him a bond for it, and by the bond also pledged a house, providing that it should be redeemed upon repayment of the principal within three years, and that the usufruct should be taken in lieu of interest. The plaintiff also at the same time executed an agreement engaging to restore the house upon the debt being paid off by the defendant. The mortgaged premises were burnt down while in the possession of the mortgagee. The defendant thereupon brought a suit to recover the value of his property, but failed on the ground that there was no proof of negligence in the mortgagee. I consider that the judgment in that suit is conclusive as to the same issue in the present case; but, whether conclusive or not, I find on the evidence that the fire was the result of an accident. Emboldened by the defendant's failure in the former suit, the plaintiff has now in his turn brought this action on the bond for the recovery of the money lent. Under the circumstances, I am of opinion that the plaintiff is not entitled to recover the mortgage-debt, unless he is in a condition to reconvey the mortgaged estate according to agreement. * * *

"As the case is one of first impression, and the issue involved is of some importance, namely, the responsibility of a

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mortgagee for the loss of the mortgaged property, I accede to the *vakil's* application to state a case for the opinion of the High Court, and pass a decree in favour of the defendant, contingent on the decision of the Honorable the Judges of the High Court."

The reference came on for disposal before GIBBS and MELVILL, JJ.

Bhairavnáth Mangesh, for the plaintiff:—According to Hindú law the suit is maintainable, as by law a mortgagee can recover the debt due to him, the pledge being lost without any default on his part.

Cur. adv. vult.

20th Sept. PER CURIAM:—The Court considers that, in the absence of any express agreement to the contrary, a creditor in whose hands a pledge has perished by accident, and without negligence on his part, is entitled to proceed against his debtor for recovery of the debt. The rule of Hindú law in this matter is in accord with that of the English and Roman laws. (Vyavahár Mayukha, Chap. V., Sec. II., cl. 4.*)

* Stokes' Hindú Law Books, p. 114.

Special Appeal No. 155 *of* 1870.

Sept. 27.

NA RA'YAN GOVIND, OK, for himself and as Administrator and Guardian of Gangádhar and Dámodhar Sakhárám .....*Appellant.*

GANESH A'TMA'RA'M FADKE *et al.* .....*Respondents.*

Surety—Mortgage Bond—Relinquishment by Mortgagee of Mortgaged Property.

Where a creditor sued his principal debtor and two sureties upon a mortgage bond, and in his plaint formally relinquished his claim against part of the mortgaged property, *it was held* that after such relinquishment the sureties were no longer bound, their position being altered for the worse by reason of such relinquishment.

THIS was a special appeal from a decree of the Acting District Judge of Thána, confirming, on appeal, the decree of the Subordinate Judge of Kalyán.

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The suit was filed by the appellants on a mortgage bond, dated the 25th of November 1862, against the representatives of the obligor, and the respondents in this appeal as his sureties. The Subordinate Judge who tried the cause dismissed it as against the respondents, holding that, as they were sureties only to the extent of Rs. 1,017-8-0, and as the plaintiff had given up his lien over part of the mortgaged property which was found to be worth that amount, the sureties were discharged from their liability. He, however, decreed the claim as against the representatives of the principal debtor. This decision having been confirmed by the District Judge, the plaintiffs preferred a special appeal, which was argued before LLOYD and KEMBALL, JJ.

Nánábhái Haridás (with him *Vishvanáth Náráyaṇ Mandlik*) for the appellant.

Shántárám Náráyaṇ for the respondents.

Cur. adv. vult.

27th Sept. LLOYD, J.:—The only question we have to determine in this case is whether the sureties are discharged from their liability, by reason of the plaintiffs having neglected to enforce their claim against the whole of the property mortgaged.

The facts of the case are these:—Rámchandra Mahádev Faḍke mortgaged certain property to Sakhárám Govind Ok for the sum of Rs. 1,017-8-0. A'tmárám Ballál and Vásudev Náráyaṇ also became sureties for this amount, which they engaged to pay off, "jointly and severally, with interest at one per cent., without making any excuse on the ground of the absence of one another."

The heirs of Sakhárám Govind Ok brought this action against the heir of Rámchandra Mahádev, and the above-named sureties, for the recovery of the money, but in the plaint they formally relinquished all claim to a portion of the mortgaged property, namely, "a moiety of the field 'Badhan,'" without assigning any reason for so doing, though it has been stated by their *vakíl* that it was because the field was not accurately described in the bond.

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The Subordinate Judge of Kalyán, who tried the suit, found the value of the land so omitted from the plaint to be equal to the amount for which the sureties had bound themselves, namely, Rs. 1,017-8-0, and, considering that the sureties were prejudiced in consequence of the plaintiffs having given up their lien on the said property, held that they were discharged from their liability, and threw out the claim as against them; and this decision has been upheld by the District Judge of Thán̈á on appeal.

It does not appear that, amongst the Reports of the High Courts in India, any case precisely touching on this point is to be found, and the only argument urged on behalf of the special appellants is that, as no new contract has been entered into between the creditor and the principal, there has been no arrangement altering the terms of the original mortgage, and the position of the sureties has been in no way affected; but the formal abandonment by the creditor of his claim against valuable property must of necessity prove injurious to the sureties, since it precludes their reimbursing themselves by obtaining a decree against the property so omitted from the plaint, and this is, under the rulings of the courts in England, sufficient for their discharge.

On this subject a learned authority has said that the rule is undoubted, and it is one founded on the plainest principle of natural reason and justice, that the surety paying off a debt shall stand in the place of a creditor, and have all the rights which he has for the purpose of obtaining his reimbursement (Story, Equity Jurisprudence, para. 499).

I am of opinion that the decision of the lower court is an equitable one, and should be upheld.

KEMBALL, J.:—I also am of opinion that the decree of the lower court should be affirmed, upon the equitable principle that where a surety's indemnity against his principal in respect of any security has become lost, the surety is entitled to be relieved to that extent. In support of this appeal, our attention has been directed to a ruling of this court in the case of *Lachman Joharimal* v. *Bápu Khandu* (*a*) to the effect

(*a*) 6 Bom. H. C. Rep. A. C. J. 241.

that "a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety." No doubt. But the general principle there laid down does not touch the question as to the right of a surety extending to all the equities which the creditor whose debt he has discharged could have enforced.

Here the mortgagee has instituted proceedings at one and the same time to recover his debt from the mortgaged property and from the sureties, and it is admitted on the face of the plaint that the sureties do not stand, as regards the securities, as they did at the time of the original contract. Assuming, therefore, that the mortgagee had succeeded in obtaining a decree in accordance with the prayer contained in his plaint, it is clear that he could not, on proceeding to execution, have availed himself of one of the remedies which the sureties stipulated should be held by him against the principal debtor, and that, therefore, to the extent of that one remedy, the sureties ought to be discharged, on the well-established doctrine that the surety, having a most material interest in the rights and remedies which the creditor has against the principal debtor, cannot be held bound where the situation of circumstances in respect to those rights and remedies are different from that contemplated by himself and all other parties.

The case of *Mayhew* v. *Crickett* (*b*) exemplifies the principle that if the creditor relinquishes securities which he could enforce in discharge of his debt, the surety becomes exonerated to the extent at least of the value of such securities: for the reason that securities which the creditor is entitled to apply in discharge of his debt, he is bound either so to apply, or to hold them as a trustee, ready to be applied should the surety desire it. In that case the creditor, having taken out execution against his debtor, withdrew it without the knowledge of the sureties, and in doing so it was held that he had discharged the sureties.

Decree confirmed with costs.

(*b*) 2 Swanst. 185.

1870.
Aug. 17.

Regular Appeal No. 29 *of* 1870.

MANSUKHRA'M PURSHOTAM *et al.* .....*Appellants.*
JAVAREVOHU, widow of Nandkisor Bhagván. *Respondent.*

Security for the Restitution of Property—Appeal—Execution—Act XXIII. of 1861, *Sec.* 36.

After property the subject of litigation has been given over in execution of a decree to the plaintiff, it is not within the scope of Sec. 36 of Act XXIII. of 1861 to exact security from the plaintiff for the restitution of such property in the event of a successful appeal.

THE appellants in this suit presented a petition, under date the 9th of June 1870, to the High Court, which stated that in a suit valued at Rs. 3,41,184-7-8, the lower court, namely, that of the District Judge of Súrat, had passed a decree in favour of the respondent Javarebái, widow of Nandkisor Bhagván, and had passed an order that execution should follow upon the said decree, and that she should recover possession of all the property awarded by the decree. That, the amount in dispute being large, and the opponent not being possessed of any property, to the best of the petitioners' knowledge and belief, except that awarded by the decree, the petitioners were apprehensive that, unless due and proper security was taken from the respondent for the restitution of any property which had come or might come into her possession by virtue of the decree, and for the performance of such order as might be passed in the appeal by this Honorable Court, serious and irreparable loss might accrue to the petitioners in the event of the High Court modifying or reversing the decree of the lower court. That the petitioners, therefore, prayed that it might be ordered that security as above should be forthwith taken, that the execution or further execution of the lower court's decree should in the meanwhile be stayed, or that a receiver might be appointed for management and care of the property pending the appeal.

The Court, on reading the above petition, granted, on the 9th of June 1870, *a rule nisi*, calling on the respondent to show cause why security should not be given for any

execution which the plaintiff (the respondent) might take out, or might have already taken out.

On the 17th of August, *coram* WESTROPP, C. J., LLOYD and MELVILL, JJ., *Macpherson* showed cause, and stated that the decree under appeal, so far as it related to immoveable property, had been already executed by the lower court, and that the property had been put in actual possession of the respondent, before the *rule nisi* was issued. He contended, under the circumstances, that the application for security was too late, and that it was not competent to the High Court to demand security in such a case. He further stated that the other part of the decree, which related to money and costs, had been already stayed by the lower court upon the petitioners' request, and urged that the petitioners ought to have made this application to the lower court, under Sec. 338 of the Civil Procedure Code, at the proper time. He contended that Sec. 36 of Act XXIII. of 1861, under which the *rule nisi* had issued, provides for security being taken only when *an order is made for the execution of a decree* which has been appealed against, and that, in the present instance, the respondent was not going to *take out*, or *enforce*, any order for the execution of her decree against the petitioners, and that, in point of fact, there was now no order for execution at all.

He also relied on the absence of any allegation on the petitioners' part of there being any attempt by the respondent to alienate, waste, or damage the property, which the lower court had adjudged in her favour, and delivered into her possession, in execution of its decree. He cited in support of his argument *Joynarain Puttur* v. *Russeek Mohun Bannerjee* (*a*).

Shántárám Náráyan, in support of the rule, alleged that certain creditors of the respondent had placed, or were about to place, attachments on the property, and rested his application for security mainly on the ground that the respondent

(*a*) 8 Calc. W. Rep., Civ. R. 144.

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had taken out execution, and entered into possession, of the property *before the appeal time had expired.*

PER CURIAM :—This application is too late. After property has passed into the possession of the successful party, under a decree in respect of which an appeal is preferred to the High Court, it is not within the scope of Sec. 36 of Act XXIII. of 1861, nor in the power of the High Court, to exact security for the restitution of such property, in the event of the decree appealed against being reversed.

The rule of the 9th of June 1870 will, therefore, be discharged with costs.

Rule discharged with costs.

1870.
Sept. 18.

Special Appeal No. 527 *of* 1869.

NA'RA'YANA'PPA' bin A'PPA' HEGDE .....*Appellant.*

BHA'SKAR PARMAYA' .....*Respondent.*

Limitation—Instalments—Acknowledgment of Debt—Act XIV. of 1859, *Sec.* 1., *cl.* 10.

When a debt is by a bond made payable by instalments, subject to a condition that in default of payment of any one instalment the whole debt shall become payable, the period of limitation commences to run as to the whole debt from the date of default being made in the payment of an instalment.

Where, a default having been made in payment of an instalment, the debtor subsequently filed a suit to compel his creditor to receive his debt by instalments as they should become due, and in his plaint set out the provisions of the bond, and stated that he had tendered the instalments as they became due to his creditor, which the latter had refused to receive, and that thereupon the debtor had deposited the amount with a third person:

It was held that the plaint did not contain such an acknowledgment of the whole debt being due as to give a new starting-point from which the limitation commenced to run.

THIS was a special appeal from the decision of A. L. Spens, District Judge at Cánará, in Appeal Suit No. 62 of 1869, affirming the decree of the First Class Subordinate Judge of Sircy.

The plaintiff, Náráyaṇáppá Hegde, sued to recover Rs. 2,736, principal and interest due on a bond, dated the 21st of February 1864, for Rs. 1,900, which the defendant, by the said bond, agreed to pay in nineteen instalments of Rs. 100 each, subject to a condition that if any one instalment should not be paid when due, the whole amount should be payable at once. The first instalment fell due on the 28th of December 1864, and the defendant then made default in payment. The plaintiff brought the present suit, on the 13th of August 1868, for the whole sum due, with interest.

The defendant admitted the execution of the bond, but pleaded that the claim was barred.

The Subordinate Judge of Sircy held that the claim was barred, under cl. 10 of Sec. 1. of Act XIV. of 1859. He said:

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"The first instalment was due on the 28th of December 1864, and on failure to pay it on that day the cause of action to recover the whole amount accrued on the very next day. The plaint was not filed till long after three years from this date, and the claim is, therefore, clearly barred. The plaintiff's *vakil* contends that the claim is saved by an admission made by the defendant in a certain deposition (exhibit No. 4) given by him in another suit, in which he sued to compel the present plaintiff to receive an instalment after date. I am of opinion that Sec. 4 of the Limitation Act does not apply to such an admission, because it is not an acknowledgment within the words of that section; it is not made to the plaintiff; and, lastly, because the so-called admission is only an admission of the genuineness of the written contract, but not of any particular sum being due." (Bourke's Limitation, p. 251.)

"I, therefore, reject the plaintiff's claim."

The plaintiff appealed from this decree to the District Court, and A. L. Spens, the District Judge, in affirming the decree appealed from, recorded the following judgment:—

"Exhibit No. 11 is a judgment passed by the Principal Ṣadr Amín in a suit brought by the present defendant to compel the plaintiff to receive instalments as provided for in this bond. The Principal Ṣadr Amín in that suit decreed for the present plaintiff, holding that the present defendant had not acted up to the terms of the bond, and declined to make any order as to future instalments. This decree was upheld in appeal. In this former suit the present defendant admitted the genuineness of the bond on the 1st of June 1868, and the present plaintiff urges that this admission brings his claim within time. The admission was made in a deposition in a suit in which the present defendant was plaintiff, and the plaintiff in this suit was defendant. His admission must be, therefore, considered in relation with the subject-matter inquired into, about which he gave his deposition. The defendant must, therefore, be held only to have admitted the bond in relation to the fact that he had, in terms of the bond

offered to pay a certain instalment, which the plaintiff refused to receive. I do not think this admission was according to the nature of the original liability; there was no new promise from which a fresh cause of action arose. Sec. 4 appears only to apply to written acknowledgments given in express terms, or in such terms as can reasonably be construed to mean recognition of a debt by the defendant to the plaintiff, according to the nature of the original liability, and renewing that liability from the date of acknowledgment. The defendant's admission was not an unqualified admission; for, while admitting the bond, he urged that he had complied with its conditions, and that it was the plaintiff who would not accept instalments, as provided for therein. I am, therefore, of opinion that the plaintiff's cause of action accrued on the defendant's failure to pay the first instalment, and that there was nothing in the conduct of the parties subsequently which altered the terms of the bond originally entered into. The admission was not made by the defendant to the plaintiff, and there is no admission of a particular sum being due.

"I, therefore, affirm the decree appealed from with costs."

The plaintiff appealed from this decision, and on the first hearing of the case, before WARDEN and SARGENT, JJ., the further hearing was adjourned, to allow time for the plaint referred to in exhibit 11 to be certified.

The alleged admission made in the plaint in Suit No. 260 of 1866 of the Sircy Court, brought by Bhâskar Parmayá against Nárâyaṇáppá Hegde, was as follows :—

"I owed the defendant Rs. 2,000, out of which he received from me Rs. 100, and obtained a bond for the balance of Rs. 1,900, stipulating that the said sum should be paid by nineteen instalments, extending over nineteen years, the amount of each instalment being Rs. 100, and payable on the 30th of Márgshirsha of each year, and that in case of default the amount of such instalment should be paid with interest. Accordingly, I tendered the amount of the first instalment, and asked for a receipt, but the plaintiff having refused to

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comply, I have deposited the amount with a third party. I made a similar request for the instalment due for the current year, but he refuses to receive it and give a receipt, and I have kept in deposit the amount as above described.

"I, therefore, pray for a decree directing the defendant to accept the two instalments due up to this time, and receive from me hereafter for seventeen years Rs. 100 a year, and pass a receipt."

29th Aug. The appeal came on for hearing this day before GIBBS and MELVILL, JJ.

Dhirajlál Mathurádás, for the appellant:—If the debtor admits that he is indebted, or admits a portion of his liability, the plaintiff can show by evidence what amount was due. Acknowledgment of debt need not be made to a creditor; any admission suffices, though made to a third person: *Kristna Row* v. *Hachapa Sugapa* (*a*); *Huro Chunder Roy* v. *Monee Mohinee Dossee* (*b*). The acknowledgment need not even contain a direct admission that the whole or a part is due; it is sufficient if the Court can collect such admission from the written instrument. [GIBBS, J.:—The District Judge was clearly in error in holding that the admission, under Sec. 4 of the Act, should be made to the creditor himself.]

Nánábhái Haridás, for the respondent:—The so-called admission does not contain any acknowledgment of the present claim. It is only an admission that Rs. 200 were due, and as to the rest, that there was nothing due. The admission must, I contend, be of an existing debt, and not of a debt to become due.

Cur. adv. vult.

13th Sept. MELVILL, J.:—This is a suit on a bond payable by nineteen instalments of Rs. 100 each, a condition being superadded, that on failure to pay any one instalment the whole amount should be recoverable with interest.

(*a*) 2 Mad. H. C. Rep. 307. (*b*) 3 Calc. W. Rep., S. C. C. Ref. 6.

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The first instalment was not paid on the day fixed, and the plaintiff has not, by subsequently accepting payment, waived his right to enforce the penalty: *Rámkrishṇa Mahádev* v. *Bayáji* (*c*).

The cause of action accrued upon the first default: *Hemp* v. *Garland* (*d*); *i.e.*, on the 25th of December 1864, and the suit is barred, unless there has been such an acknowledgment of liability by the defendant as will bring the case within the provisions of Sec. 4 of Act XIV. of 1859.

It is contended that exhibit No. 4 contains such an acknowledgment. That exhibit is a plaint filed by the present defendant against the present plaintiff, to compel the latter to take payment of the first two instalments due on the bond, which the former alleged to have been tendered in time.

It seems clear that this cannot be construed into an admission that the debt now sued for, or any portion thereof, is due. On the contrary, it is a distinct repudiation of the particular liability which the plaintiff seeks to enforce. The plaintiff, alleging a default, claims the penalty, and treats the agreement to pay by instalments as at an end. The defendant denies that there has been any default, or that the penalty is due, and only admits that he owes two instalments. The liability which the defendant acknowledges is not only not involved in the liability which the plaintiff seeks to enforce, but is inconsistent with it. If the debt which the defendant admits be due, the plaintiff has no cause of action. The acknowledgment contemplated in Sec. 4 of Act XIV. of 1859 must be an acknowledgment of the existence of a liability arising out of the particular cause of action on which the creditor afterwards brings his suit. We, therefore, confirm the decree of the court below with costs.

(*c*) 5 Bom. H. C. Rep., A. C. J. 35. (*d*) 4 Q. B. 519.

1870.
Oct. 5.

Civil Petition.

IBRA'HIM FATTE ALI', a minor, by his Guardian, Shek Mámá Bában valad Shek Mohidín. .....*Petitioner.*
CHANDRA'BHA'U valad BA'PUJI .....*Opponent.*

Judgments—Copies—Small Cause Courts.

Judges of Courts of Small Causes are bound to give copies of their judgments to parties requiring them.

THIS was an application to the High Court for the exercise of its extraordinary jurisdiction.

The petitioner sued Chandrábháu valad Bápuji, Márvádi, in the Small Cause Court at Ahmednagar, but his claim was rejected. The petitioner then applied to the Judge of the Small Cause Court, requesting him to furnish a copy of his judgment, as the petitioner intended to appeal to the High Court against the decree, but the Judge refused to furnish him with the necessary copy, on the ground that there was no appeal allowed from the decision of a Small Cause Court.

The petitioner thereupon prayed for an order directing the Judge of the Court of Small Causes at Ahmednagar to furnish the necessary copy.

J. L. Warden, Judge of the Small Cause Court at Ahmednagar, upon the petition being referred to him for report, stated, as his reason for refusing to give an authenticated copy of his judgment in cases decided by him, that "all decisions and orders of Courts of Small Causes being final, under Sec. 21 of Act XI. of 1865, and there being no special appeals in suits of the nature cognisable in Courts of Small Causes (Sec. 27 of Act XXIII. of 1861), petitioners are not entitled to certified copies on the ground that they intend to appeal against such judgments.

"Under Sec. XII., cl. 1, of Reg. III. of 1827, a party was entitled to a copy of every document produced and used in

a suit, except of the court's minute-book, and in courts where there is no minute-book this exception would cover the court's judgment. This Regulation has been, however, repealed by the Bombay Civil Courts Act, which substitutes no provisions for those of Reg. III."

The Court (present GIBBS and MELVILL, JJ.) passed the following order on the petition :—

It is true that Reg. III. of 1827 has been repealed, but, under the provisions of the Bombay Civil Courts Act, the High Court continued the old rules as the rules to be observed in the matter of giving copies of the record to the parties to the suit.* By Sec. 47 of Act XI. of 1865, the provisions of the Code of Civil Procedure, so far as the same are applicable, extend to the Courts of Small Causes, and by Sec. 198 of the Civil Procedure Code the Court is bound to give copies of judgments and decrees to the parties. This provision is clearly applicable to the Small Cause Courts; and the Court, accordingly, directs that the Judge of the Court of Small Causes at Ahmednagar should grant the copies asked for by the petitioner.

* Vide *Circular No.* 590 *of* 1869. *The following is an extract from paragraph* 2 :—

" The proceedings of each Civil Court shall be kept and recorded, and copies of papers shall be granted according to the rules in force at the time of the passing of the Act " (*17th April* 1869).

1870.
Nov. 22.

Referred Case.

THE COLLECTOR OF THA'NA' .....*Petitioner.*
GANA' RA'MJI PA'TI'L .....*Opponent.*

Fee of Pleader—Registration Petition—Act XX. of 1866, *Sec.* 84—*Act I. of* 1846.

The fee to be allowed to a Pleader upon a petition to the Court to establish the right to have a document registered under Act XX. of 1866, Sec. 84, is one-fourth of the fee allowable in a regular suit, as is provided by Act I. of 1846, Sec. 7.

CASE stated for the decision of the High Court, under Sec. 28 of Act XXIII. of 1861, by W. M. P. Coghlan, Judge of the Thánáá District.

The applicant, the Collector of Thánáá, presented an instrument, executed in his favour by Ganáá Rámji Pátíl on the 24th of December 1868, conveying to him absolutely certain land in the village of Nahávi, in the Thánáá District, for registration before the Sub-Registrar of Karanjá, who refused to register the same, on the ground that Ganáá Rámji Pátíl had declined to sign an indorsement on the said instrument. The applicant thereupon appealed to the Registrar, who confirmed the Sub-Registrar's order of refusal. The applicant accordingly, applied to the District Judge to set aside the order of the Registrar, and order the instrument to be registered.

The Judge, after hearing the Government Pleader for the petitioner, and Mr. Govind Bábá for the opponent, made an order by which he directed that the orders of the Registrar and Sub-Registrar should be set aside, and that the Sub-Registrar do register the instrument: costs on the respondent.

On the motion of the *vakíl* for the opponent, the District Judge submitted the following question of law:—"I have allowed full Pleader's fees in this case. It is contended for the respondent that this is not a regular suit, and, therefore, under Act I. of 1846, Sec. 7, one-fourth fee only should be allowed. It is argued that in Act XVI. of 1864 a matter of this nature was denominated a regular suit, but that in the Act which superseded that statute, Act XX. of 1866, the

Legislature have deliberately substituted the word 'petition' for 'regular suit,' intending to show that one-quarter fee alone is leviable. I am clear that, under Act XVI. of 1864 a full fee was payable, and it has been so ruled in *Mowla Buksh* v. *Bahadoor Ali Khan* (*a*).

"The procedure now under Act XX. of 1866 is exactly the same as it was under Act XVI. of 1864. The only question is whether the word 'petition' being used instead of 'regular suit' takes away the right to full fee. I do not think that the change in the name of the proceeding can take away the right to full fee. If such a proceeding was a regular suit under Act XVI. of 1864, this is *really* one now, although it is called a petition. I am inclined to think that the change in nomenclature had not a change in Pleader's fee in view, but was adopted to distinguish between an action of this kind and an ordinary regular suit under the Civil Procedure Code."

PER CURIAM (GIBBS and MELVILL, JJ.):—The Court does not agree with the District Judge, and is of opinion that, a petition having been substituted by Act XX. of 1866 for a regular suit as the remedy for a refusal to register a document, under the provisions of Sec. 7 of Act I. of 1846, the amount allowed for Pleader's fees should be one-fourth of what it would have been in a regular suit.

Special Appeal No. 405 *of* 1870.

Dec. 5.

UJI, daughter of Hargovan Ranchhod *et al.* .....*Appellants.*

HA'THI LA'LU .....*Respondent.*

Nátrá *Marriage—Permission by Caste—Divorce—Immoral Custom.*

A custom which authorises a woman to contract a *nátrá* marriage without a divorce, on payment of a certain sum to the caste to which she belongs, is an immoral custom, and one which should not be judicially recognised.

THIS was a special appeal from the decision of F. D. Melvill, Acting Judge of the district of Ahmedábád, in

(*a*) 9 Calc. W. Rep., Civ. R. 101.

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Appeal Suit No. 30 of 1870, confirming the decree of Dinshájí Pestanji, Subordinate Judge of Ahmedábád.

The plaintiff sued his wife for the restitution of conjugal rights; and joining with her as co-defendants her father, mother, and a person who had gone through the ceremony of *nátrá* marriage with her, prayed that the obstruction caused by these people to his wife's returning to him should be removed. The defendants pleaded that the plaintiff had divorced his wife, and that the custom of the *Mochi* caste, to which they belonged, allowed a *nátrá* marriage with a woman having a husband alive, on the payment of a sum of money to the caste.

The court of first instance made a decree for the plaintiff. This decree the court of appeal upheld, recording the following finding :—

"The points at issue are—(1) Has the woman been divorced by her husband, so that her subsequent marriage is legal? (2) if not, can the custom pleaded by the defendant, even if proved, be considered valid ? and (3) if so, is it proved ?

"I find on the first point in the negative. It is admitted that no deed of divorce was executed, but it has been urged, and evidence has been adduced to prove, that the plaintiff, when called upon by the caste to take his wife back or maintain her, refused to do either, and said that he gave her up. In an important question like this, oral evidence must be admitted with the greatest caution, and I do not consider it proved that he did, by any words which he used, abandon his legal rights. He may have treated her badly; in fact, there is no doubt that he has turned her off, and for many years refused to maintain her. But, as his married wife, she had claims on him, which she could have enforced by law, and the mere fact that she has not chosen to enforce these rights (for instance, that of maintenance), and that she has, to a certain degree, quietly acquiesced in his resolution that he would not have her in his house, can give her no right to look upon the marriage as dissolved.

"The custom pleaded by the defendant is embodied in a deed (No. 37) passed by the caste in 1835. It was then for

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the first time reduced to writing, but it is stated to be immemorial. In this deed it is laid down that in the event of a divorce taking place, the sum of Rs. 32 shall be paid to the caste by either the man or the woman, according as it was the one or the other by whose desire the divorce was effected; and that if a man contracts a *nátrá* marriage with a woman having a married dress (*sáchuri*), he or her parents shall pay a fine of Rs. 105 to the caste. The defendants argue from this that any woman may contract a *nátrá* marriage, even without a divorce, if the fine be paid; and a number of witnesses have been called to prove that such is the custom recognised in the caste, and that such marriages have taken place, and are considered binding. Merely looking at the deed, I think it is extremely doubtful whether the right interpretation has been placed on it, as no mention is made in it of the woman not having obtained a divorce. But I will first consider whether, if the custom be proved, it can be held to be valid. Now such a custom is clearly opposed to Hindú law. This fact is not denied by the defendants, but it is pleaded that the courts must look first to the custom of the country. It is urged for the plaintiff that no custom can be recognised if it is immoral. Of the tendency of such a custom there can be no doubt, as by it any man with Rs. 105 to spare might marry any married woman who might be tired of her husband, and has a fancy to him. This would be nothing more or less than legalising adultery. The Pleader for the plaintiff has quoted a ruling by the Bombay High Court (Rep., Vol. II., Pt. I., p. 124) (*a*), in a criminal case. A precisely similar custom had been set up as a defence against a charge of adultery. It was there held that such a caste custom, even if it be proved to exist, is invalid, as being entirely opposed to the spirit of Hindú law, and that a marriage entered into in accordance with such a custom is void. If, then, such a custom cannot be looked upon as a good defence in a criminal case, much less can it be in a civil case.

(*a*) *Reg.* v. *Karsan Goja.* See corrected report, 2 Bom. H. C. Rep. (2nd ed.), p. 117.

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"The Pleader for the defendants has referred to another Crown Case, reported in Bombay High Court Reports, Vol. V., p. 17 (*b*); but the ruling in that case does not apply to the present case.

"I find, then, that the custom, even if provèd, is invalid.

"No finding is required on the third point at issue."

The special appeal was heard before LLOYD and KEMBALL, JJ.

Dhirajlál Mathurádás, Government Pleader, for the special appellants.

Nánábhái Haridás for the special respondent.

PER CURIAM :—It has not been shown to us that the Judge has, as alleged, misconstrued the document exhibit No. 37; for, with the explanation now attempted by the appellants' *vakil*, we do not find that it professes to go to the extent argued, and authorises a woman to contract a *nátrá* marriage without a divorce on payment of a certain sum to the caste, but, even admitting that it does go as far as this, we are of opinion that it is an immoral custom, which should not be recognised judicially, and that, therefore, the lower courts were right in their decision in favour of the plaintiff.

Decree confirmed with costs.

Dec. 22.

Special Appeal No. 277 *of* 1870.

MULJI BECHAR *et al.* .....*Appellants.*
ANUPRA'M BECHAR.....*Respondent.*

Certificate of Sale—Registration—Admission—Traverse.

A certificate of sale of immoveable property of the value of more than one hundred rupees must be registered, and the fact of sale cannot be proved except by the production of such certificate.

The mere fact that an allegation is not traversed does not relieve a plaintiff from the burden of proving his case.

THIS was a special appeal from the decision of E. T. Candy, Acting Assistant Judge at Ahmedábád, in Appeal Suit No. 352 of 1869, reversing the decree of the Subordinate Judge of Neriad.

(*b*) *Reg.* v. *Manohar Raiji.*

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MULJI BECHAR *et al.* v. ANUPRA'M BECHAR.

The special appeal was argued before LLOYD and KEMBALL, JJ., on the 11th of November 1870.

Shántárám Náráyaṇ appeared for the appellants.

Nánábhái Haridás appeared for the respondent.

The facts, in so far as they are material, sufficiently appear from the following judgment:—

LLOYD, J.:—In this case Anuprám Bechar sued for possession of certain land purchased by him at a court's sale. The claim was thrown out by the Subordinate Judge of Neriad, because the certificate of sale was not registered. On appeal, however, the Assistant Judge of Ahmedábád held that though the certificate of sale affected immoveable property of more than one hundred rupees in value, and was, therefore, inadmissible in evidence by reason of its not having been registered, it was competent to the plaintiff to prove his purchase by other evidence; but, the fact of the sale not having been disputed, the necessity to do so did not arise; and as the land was the property of the party, in virtue of a decree against whom it had been sold, the plaintiff was entitled to possession. He, therefore, reversed the decision of the Subordinate Judge, and decreed for the plaintiff.

The issues which this Court has to determine are (1) whether the plaintiff is relieved of the burden of proving the sale; and, if not, (2) can the plaintiff prove the sale otherwise than by production of the certificate of sale.

Now no direct admission of the sale has been pointed out to us, and the mere fact that an allegation is not traversed does not, as has been held by the Privy Council, and also by this court, relieve a plaintiff of the *onus* of proving his case.

With regard to the second question, the only construction to be placed on Sec. 259 of the Code of Civil Procedure is that no valid transfer of the right, title, and interest of a defendant in the property sold is made until the court ordering the sale has granted a certificate; and as such certificate in a case like the present is inadmissible unless registered, to rule that the sale can be proved by other evidence would be

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to defeat the purpose for which the Registration Law was enacted.

Both issues must be decided in the negative; and the decree of the lower appellate court reversed, and that of the Subordinate Judge upheld.

Costs throughout on special respondent.

Decree of lower appellate court reversed, and that of the Subordinate Judge confirmed.

March 2.

Miscellaneous Appeal No. 8 *of* 1869.

CHANBASA'PPA' bin SANGA'PPA' *et al.* .....*Appellants.*
MAINA'BA' bin MAHA'DSHET .....*Respondent.*

Practice—Ex parte *Decree*—*Service of Summons*—*Summons not served in time.*

Where an *ex parte* decree was passed against the defendant and it appeared that the writ of summons had not been served upon him in sufficient time to enable him to appear and answer, the appellate Court, reversing the order of the court of first instance, directed the *ex parte* decree to be set aside and ordered a new trial.

Quære whether the affixing of a summons to the outer door of the place of business of a defendant is good service upon him under Sec. 55 of the Code of Civil Procedure.

THIS was an appeal from an order passed by the First Class Subordinate Judge at Puṇá rejecting an application made by the defendants to set aside an *ex parte* judgment passed against them in Suit No. 168 of 1869.

The Subordinate Judge of the First Class at Puṇá, in rejecting the application, recorded the following observations:—

"From the endorsement on the back of the summons, it appears that it was served on the 17th of April by fixing a copy thereof on the outer door of the defendants' place of business at Puṇá. The summons was served on the 17th, and the hearing of the suit was fixed for the 19th of April.

"There was, therefore, sufficient time for the defendants' men in their new shop at Puṇá to communicate with the defendants by telegram, and for the defendants to come here and

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be present in court on the 19th of April. The defendants first stated that they were at Solápur when the summons was served, but in a subsequent petition they stated they were at Bársi. These two contrary statements cannot be reconciled, and it strikes me that after the application was made, the defendants must have thought that there was sufficient time for them to come from Solápur, and that they, therefore, now state that they were at Bársi when the summons was served. The defendants' *vakíl* admits that the defendants are in pecuniary difficulties, and that there are decrees outstanding against them. It seems, therefore, that the application is made with a view to obstruct the plaintiff in the execution of his decree. I, therefore, reject the application, with costs on the defendants."

The defendants appealed from this order, and the appeal was heard before COUCH, C.J., and MELVILL, J.

Pándurang Balibhadra for the appellant.

Shántáram Náráyaṇ for the respondent.

Cur. adv. vult.

COUCH, C. J.:—We think it doubtful whether the summons in this case was properly served, for Sec. 55 of the Code requires that the copy of the summons should be fixed on the door of the house in which the defendant is dwelling, and it would not be sufficient that it should be affixed to the door of the defendant's place of business. But it is not necessary for us to determine this point, for we are of opinion that even if the summons were properly served it was not served in sufficient time to enable the defendants, who are admitted to have been absent from Puṇá, to appear and answer; and a representation to this effect having been made to the Subordinate Judge, he ought to have postponed the hearing of the suit. The terms of Sec. 113 of the Code are imperative on this point. We reverse the Subordinate Judge's order of the 4th of October 1869, rejecting the application to set aside the *ex parte* judgment, and order that the *ex parte* judgment be set aside and the suit reheard. Costs of this appeal to be paid by the respondent.

1870.
July 12.

Referred Case.

NA'RA'YAN SADA'SHIV .....*Plaintiff.*
BA'PUJI BALA'L .....*Defendant.*

Stamp Act, No. XVIII. of 1869, *Sec.* 4—*Document executed in Foreign Territory.*

An unstamped instrument executed in foreign territory and valid under the law of the place of execution is admissible as evidence in Courts of British India, provided it does not affect any property situated in British India. (Act XVIII. of 1869, Sec. 4.)

THIS was a reference made by Ráv Báhádur Janárdan Vásudevji, Judge of the Court of Small Causes at Puná. The case stated by the Judge was as follows:—

"The plaintiff sues the defendant for the payment of Rs. 111-2-0 on a guarantee, which has been executed at the foot of a promissory note made by one Chhaganlál Purshottamdás for Rs. 99-3-6.

"The guarantee was executed four months after the date of the note, and is for the balance, Rs. 87-8-0, which was found due on that note.

"Both the note and the guarantee were executed at Náusári, a town in His Highness the Gáikvád's territory, and the paper bears a stamp said to be of that government, and impressed about fourteen months after the date of the guarantee.

"The defendant, *inter alia*, contends that the document in question cannot be held valid in our courts unless it is stamped with a British stamp.

"The question, therefore, for consideration is whether an instrument executed in a foreign country and bearing a stamp of that country can be admitted in evidence in our courts without a stamp of this government impressed thereon.

"It is a principle of international law that an instrument, as to its form and solemnities, is to be governed by the *lex loci contractús*, and not the *lex solutionis* (*vide* Story's Conflict of Laws, Sec. 318); and this principle seems to me to have been recognised in our new stamp law (Act

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XVIII. of 1869) inasmuch as Sec. 4 of that Act subjects to stamp duty only those of the instruments executed out of British India which relate to any property within British India

"I am, therefore, of opinion that an instrument executed in a foreign territory, and which is valid by the law of that place, and does not affect any property within British India, can be admitted in evidence in our courts without a British stamp."

The reference was heard this day before GIBBS and MELVILL, JJ.

PER CURIAM:—The Court agrees with the opinion expressed by the Small Cause Court Judge.

Small Cause Court Judge informed accordingly.

Special Appeal No. 326 *of* 1870.

Dec. 6.

SANGA'PPA' bin CHANBASA'PPA' .....*Appellant.*
SA'HEBA'NNA' bin KENGEDA'PPA .....*Respondent.*

Hindú Law—Undivided Family—Manager—Payment to eldest member of Family.

The debtor of an undivided Hindú family is not justified in paying his debt to the eldest member of the family unless such eldest member be also the manager of the undivided family. If there is no manager, the debtor should obtain a release from all the members of the undivided family.

THIS was a special appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge at Kalládgi, in Appeal Suit No. 70 of 1869, reversing the decree of the Subordinate Judge of Mudebihál.

The plaintiff, Sangáppá bin Chanbasáppá, instituted this suit to recover the sum of Rs. 8-8-0 due as rent for the year 1868-69 of an *inám* field which he alleged the defendant held as a tenant from him.

The defendant answered that the plaintiff was not the owner of the field, but that it belonged to Basáppá, who was

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a step-brother of the plaintiff, from whom he held as tenant, and to whom he had paid the rent due thereon.

It appeared that the defendant had held the *inám* field from the plaintiff's father, to whom he had paid the rent down to the year 1868-69, when the plaintiff's father died, leaving two sons, the plaintiff and Basáppá, a stepbrother of the plaintiff. The plaintiff was the elder brother, and the family was undivided.

The Subordinate Judge of Mudebihál held upon these facts that the plaintiff, as being the eldest member of an undivided family, was entitled to manage the family estate after his father's death. He, accordingly, decreed in favour of the plaintiff.

The defendant appealed from this decree, and the Senior Assistant Judge, in reversing the decree, delivered the following judgment:—

"It appears that the plaintiff and Basáppá are step-brothers, and that their father died in March 1868. Basáppá admits that while his father was alive he gave the receipts to the ryots. Basáppá's allegation of separate management during his father's life-time is not established by satisfactory proof. The question of previous management cannot, therefore, be raised. The brothers took to disputing immediately after their father's death, and the Subordinate Judge has decided for the plaintiff, on the ground that as the elder brother he is entitled to manage his father's undivided estate. But his title under Hindú law is by no means so certain as the Subordinate Judge seems to have held. From Strange's book on Hindú law it would seem that the management depends rather upon capacity than upon primogeniture, and though the claim to it is with the eldest, it is subject to the character and the general sense of the coparceners, without a concurrence of which no pretension of the kind can have any validity.

"Therefore it is clear that the mere fact of the plaintiff being the elder brother does not necessarily give him the right of exclusive management.

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"As it is proved that the defendant has paid Basáppá, who is equally entitled, as co-heir, to receive payment, and I do not think the plaintiff has made out his right to recover from the defendant again, a payment made by the defendant to Basáppá is to all intents and purposes made to the plaintiff, and he and Basáppá must arrange as to the division of the whole of the proceeds between themselves. If they cannot agree together their best plan is to effect a partition. My finding is thus against the plaintiff, and I reverse the decree of the Subordinate Judge. The plaintiff is to bear all costs in both courts."

The plaintiff appealed from this decision, and the appeal was argued before GIBBS and MELVILL, JJ., this day.

Vishvanáth Náráyan Mandlik for the appellant.

Shántárám Náráyan for the respondent.

Cur. adv. vult.

GIBBS, J.:—The defendant in this case is the tenant of an undivided Hindú family, which now consists only of the plaintiff and his younger brother, Basáppá, their father having died in the year preceding that for which the rent is in dispute. The defendant paid the rent for the latter year to Basáppá, and the plaintiff now sues to compel him to pay the rent again, on the ground that he (the plaintiff), being the elder brother, is entitled to manage the family estate, and that Basáppá had no right to receive the rents.

The Subordinate Judge awarded the claim on the ground that the plaintiff, being the elder brother, must be considered to be the manager of the family until the contrary be proved. This decision has been reversed by the Senior Assistant Judge, who considered that a payment to Basáppá was to all intents and purposes a payment made to the plaintiff. He held that the mere fact of the plaintiff being the elder brother did not necessarily give him the right of exclusive management, and in support of this view quoted Strange's work on Hindú Law as showing that the right to management depends rather upon capacity than upon primogeniture, and that

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although the claim to it is with the eldest, it is subject to character, and the general sense of the coparceners, without a concurrence of which no pretension of the kind can have any validity.

We cannot accept the Senior Assistant Judge's decision in its entirety, for the effect of it would be to establish the proposition that the debtor of an undivided family may pay his debt to any member of the family to whom he may choose to pay it. Considering that united Hindú families frequently consist of very numerous members distantly related, the result of such a practice would be a scramble for the family income, and continual recriminations and disputes. As Sir Thomas Strange says, in the passage referred to by the Senior Assistant Judge, "In order to avoid confusion, reason and law alike suggest the expediency of adopting some one member of the family to manage its concerns." We think that the debtor of a united Hindú family is bound, like any other debtor, either to obtain a receipt from every member of the family, or to satisfy himself that the single member to whom he makes payment is authorised to act for the rest.

In the present case, the defendant had always dealt with the father of the plaintiff, whose right to the management was undisputed. Upon his death the two sons, as the Assistant Judge has found, took to disputing immediately. Under these circumstances, the defendant's only safety was either to obtain a joint receipt from both the brothers, or to ascertain that the brother to whom he paid the rent was acting with the consent of the other. It is clear that he did nothing of the kind.

Basáppá is not a party to the suit, and we cannot now decide which of the two parties is entitled to the management. But it is certain that when he received the rent from the defendant, Basáppá was not acting with his brother's consent, and that he had not established his title to act without his consent.

Under these circumstances, we must hold the plaintiff entitled to recover, but only to half the extent claimed. He

sues on behalf of the family—that is, of himself and his brother—and they are entitled to share equally in the sum which may be recovered. He cannot be allowed to recover, as agent for his brother, what his brother has already received.

There will be a decree for the plaintiff for Rs. 4-4-0, being half the amount claimed. But though the plaintiff has to a certain extent succeeded, we do not think that it is a case in which he should be allowed his costs. The payment by the defendant to Basáppá was made incautiously, but there is no reason to suppose that it was made otherwise than in good faith. Instead of making a third party the victim of the family discord, and driving him to the trouble and expense of recovering from Basáppá the amount improperly received, the plaintiff should have settled his dispute with Basáppá, in which case he would have received half the defendant's rent from Basáppá, or should have compelled a partition, in which case also he would have received half the rent upon a settlement of account. Each party must bear his own costs throughout.

Decree amended.

1870.
July 28.

Special Appeal No. 122 *of* 1870.

KASANDA'S LA'LDA'S *et al.* .....*Appellants.*
PRA'NJIVAN A'SHA'RA'M.....*Respondent.*

Code of Civil Procedure, Sec. 259—*Prior and Puisne Mortgagees—Nature of prior Mortgagee's Security.*

The security to which a mortgagee becomes entitled under the ordinary form of mortgage in the Mofussil is the right to sell the entire estate of the mortgagor as the same existed at the date of the mortgage, and he cannot be deprived of this security by any subsequent charges on the property or prior unregistered charges which the mortgagor may create or have created. When he brings the property to sale, the sale is an out-and-out sale of the estate of the debtor, and the purchaser takes the property subject only to those encumbrances which were in existence at that date, though such of the subsequent encumbrancers as may, at the time of the sale, have taken out execution, may have a right to satisfy their claims from the surplus proceeds of the sale.

In applying Sec. 259 of the Code of Civil Procedure to cases of the above description the words "the right, title, and interest of the defendant in the property sold" must be understood as meaning the right, title, and interest which the decree ordered to be sold, *i.e.*, the right, title, and interest which the judgment-debtor had in the property at the time of the mortgage.

THIS was a special appeal from the decision of E. T. Candy, Acting Assistant Judge of Ahmedábád, in Appeal No. 80 of 1869, reversing the decree of the Principal Sadr Amín of Ahmedábád.

The plaintiff represented the purchaser of the property in dispute, at a court's sale held on the 18th of November 1864, in satisfaction of a registered mortgage-deed, dated the 20th of November 1862, on which a decree had been obtained on the 24th of September 1864. The defendants, who were mortgagees of the same property under an unregistered deed of the 24th of July 1862, obtained a decree upon their mortgage-deed on the 19th of March 1866, and attached the property on the 13th of August 1866. The plaintiff thereupon sued to have this attachment removed, and to have his own right to the property declared.

Upon these facts the court of first instance threw out the claim of the plaintiff. The court of appeal reversed that finding, and awarded the claim of the plaintiff.

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The special appeal was argued before GIBBS and MELVILL, JJ.

Nánábhái Haridás, for the appellants:—The defendants' mortgage was in existence at the date of the plaintiff's purchase at the auction-sale. What a purchaser buys at an auction-sale is only the right, title, and interest of the judgment-debtor on the day of the sale, which in this case was the equity of redemption. The plaintiff, therefore, bought the house burdened with the defendant's mortgage. Sec. 259 of the Civil Procedure Code supports this view: see also *Bhikáji* v. *Vallabhdás* (*a*).

Nagindás Tulsidás appeared for the special respondent:—The right title, and interest bought by the plaintiff was the entire property which the mortgagor could mortgage at the time when the registered mortgage was executed—that is, the entire interest in the property: for the defendant's mortgage was of no avail to lessen that interest, it not being registered. If the first mortgagee be held to have bought only the equity of redemption, the puisne mortgagees would be in a better position than he. He cited *Prahlad Misser* v. *Udit Narayan Sing* (*b*).

The judgment of the court was delivered by

MELVILL, J.:—The first point which we have to consider is the effect of registration. The deed which is the origin of the respondent's title is registered; the deed through which the appellants claim, though prior in point of time, is not registered. Act XIX. of 1843, which is the law applicable to the case, provides that a registered deed of mortgage shall be satisfied in preference to every prior unregistered deed of mortgage. The effect of this provision is to reverse the position of the two mortgagees. By virtue of registration the second mortgagee obtains the same rights as if his mortgage had been prior in point of time. We may deal with this case, therefore, as if the mortgage-deed on which the respondent's claim is founded had been

(*a*) 2 Bom. H. C. Rep. 209 (2nd ed.).
(*b*) 1 Ben. L. Rep., A. C. 197.

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executed before the mortgage-deed which is the origin of the appellants' title.

Next, what is it which a mortgagee brings to sale when he obtains a decree for sale in satisfaction of his mortgage? It has been argued for the appellants that in such a case all that is sold is the right, title, and interest of the mortgagor as the same existed at the time of sale; that such right, title, and interest cannot be dissociated from the liabilities to which the property is subject; and that, therefore, the purchaser is bound to satisfy all charges on the estate. Such argument is specious, and derives a certain amount of support from the words of Sec. 259 of the Code of Civil Procedure. But a very little consideration will show that it cannot be maintained. If such were the law, a prior mortgagee and the holder of the first decree against the property would, instead of being benefited, be prejudiced by the superiority of his claim against the property. A purchaser would give for the property no more than the difference between the market value of the property and the amount of the encumbrances to which it was subject. If the property were heavily mortgaged, this would amount to little or nothing. Thus the first decree-holder, who would probably be also prior mortgagee, would get little or nothing, while subsequent encumbrancers would be paid in full.

The security to which the mortgagee becomes entitled under the ordinary form of mortgage in the Mofussil is the right to sell the entire estate of the mortgagor as the same existed at the date of the mortgage. He cannot be deprived of this security by any subsequent charges on the property which the mortgagor may create without his consent. When he brings the property to sale, the sale is an out-and-out sale of the estate of the debtor as it existed at the date of the mortgage. The purchaser takes the property subject to encumbrances which were in existence at that date, but subsequent encumbrancers have no longer any claim upon the property, though, of course, any of them who at the time of sale may have taken out execution has a right to satisfy his claim from the surplus proceeds of the sale.

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In applying Sec. 259 to cases of this description, the words "the right, title, and interest of the defendant in the property sold" must be understood as meaning the right, title, and interest which the decree ordered to be sold, *i.e.*, the right, title, and interest which the judgment-debtor had in the property at the time of the mortgage.

The respondent in this case, repesenting the purchaser at a sale in execution of a decree obtained by the paramount mortgagee, is not liable for the appellant's claim, which is founded on a puisne mortgage.

The decree must be confirmed with costs.

Decree affirmed with costs.

Special Appeal No. 195 *of* 1870.

Aug. 8.

VITHAL VISHVANA'TH PRABHU.....*Appellant.*
RA'MCHANDRA SADA'SHIV KIRKIRE .....*Respondent.*

Procedure—Objections to Remand Order—Depositary—Trustee.

The court of first instance rejected a claim on the ground that it was barred by limitation. The court of appeal, however, entertaining a contrary opinion, remanded the case for trial on the merits. The case was, accordingly, in both courts, tried upon the merits.

Held that the omission to prefer a special appeal from the order of remand did not preclude the party aggrieved by that order from objecting to it in a special appeal preferred against the final decree of the appellate court.

Where immoveable property was given into the possession of the defendant under an order of a revenue officer which directed the defendant to sell the crops, and, after payment of Government dues, to account for the profits to the plaintiff on his claiming it, it was held that the defendant was not a depositary, but a trustee, of the property.

THIS was a special appeal from the decision of A. Lyon, Assistant Judge of Ratnágirí, in Appeal Suit No. 262 of 1868, confirming the decree of the Ṣadr Amín of Ratnágirí, Dáji Govind.

The plaintiff, Rámchandra, alleged that he was a half-sharer in the *khoti* of the hamlet Gavane, in the village of Harcheri, of which the defendant, Vithal Prabhu, is the *khot*. The plaintiff failing to pay all the defendant's dues, his half-share

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of the hamlet lapsed to the defendant as *khot* of the entire village. Subsequently the whole village was attached by the Collector on account of the defendant's failure to give in the customary *kabuláyat* (agreement), but was restored to him in 1862-63, under a decree of a civil court. During the Collector's attachment the plaintiff had applied to him to take his *kabuláyat* and let him have the management of his share of the hamlet, but, on the defendant's objection, the Collector refused his application. The plaintiff, therefore, claims to obtain the management of his share on his paying whatever might be found due to the defendant. He also claims damages for certain trees felled by the defendant.

The remaining facts appear from the following judgment:—

LLOYD, J.:—This claim was thrown out by the Ṣadr Amín of Ratnágirí, who originally tried the suit, on the ground that more than twelve years had elapsed since the cause of action arose, inasmuch as the plaintiff had not had management of the lands sued for for more than thirty years previous to the institution of the suit.

On appeal, Mr. Naylor, then Assistant Judge of Ratnágirí, overruled this objection, holding that the defendant, to whom the plaintiff's share had been made over on the 27th of December 1828 by the revenue authorities, must be looked on in the light of "a depositary," and, therefore, the term of sixty years laid down in cl. 15, Sec. 1. of Act XIV. of 1859 was applicable: and he remanded the case for reinvestigation on its merits.

No special appeal was preferred against this remand order, and the case was disposed of by the same Ṣadr Amín, and a decree passed in the plaintiff's favour.

This decision being appealed against, the case went before Mr. Lyon, Acting Assistant Judge, who declined to enter into the question of limitation, considering himself incompetent to do so, as the issue had been already tried and determined by his predecessor (Mr. Naylor). On the other

issues he concurred with the lower court and confirmed the decree.

The case now comes before us on special appeal, and among the objections raised one is that the suit is barred by the law of limitation. It is, however, argued for the plaintiff that as no special appeal was preferred against the remand order of Mr. Naylor, who decided the question of limitation in the plaintiff's favour, the defendant cannot now dispute the point.

We have, therefore, first to determine whether the omission of the defendant to make a special appeal against Mr. Naylor's interlocutory decree debars him from raising the question now.

I think this question must be decided in the negative.

The former practice of this court was not to admit a special appeal against a remand order; but since the ruling in S. A. No. 85 of 1865 (*a*) such special appeals have been allowed; it has, however, never been held by this court that the omission to prefer such a special appeal will preclude the aggrieved party from bringing up the whole case in a special appeal against the subsequent decision, and it has been repeatedly decided by the Calcutta High Court that a remand order may be looked on in the light of an interlocutory order in the course of the suit to which objection may be raised in a special appeal against the ultimate decision.

It has also been held by the Privy Council (*vide* 7 Moo. Ind. App. 302 (*b*), and Sutherland's Privy Council Judgments 627) that such an order of remand *is* an interlocutory one, inasmuch as it does not purport to dispose of the case, and may be called into question in appeal, even though acquiesced in and submitted to at the time.

We are, therefore, it appears to me, justified in going back to Mr. Naylor's decree, to see whether the question of limitation was properly disposed of.

(*a*) *Subhana Madanji* v. *Bakta Jiaanshet*, decided by *Couch*, C.J., and *Tucker* and *Warden*, JJ., on 12th April 1865.

(*b*) *Maharajah Moheshur Sing* v. *The Bengal Government.*

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Mr. Naylor held that the land was deposited for management during the absence of the plaintiff in the hands of the defendant, who was to give it up on the return of the plaintiff, with any surplus that might have accrued after defraying the costs of management, or to be reimbursed should he have sustained any loss; and as under this arrangement the defendant had become a depositary, the term of sixty years, laid down in cl. 15, Sec. I. of the Limitation Act, was, he considered, applicable to the suit, and hence it was not barred; this view of the law seems, however, to be erroneous, and is opposed to the ruling of this court in S. A. No. 96 of 1866 (*c*), wherein it was held that the term "depositary" in this Act does not apply to immoveable property; but it has been argued—and, I think, justly, looking to the terms of the Mámlatdár's order—that the defendant held this property in trust for the eventual benefit of the plaintiff; and hence, under Sec. 2 of the said Act, which provides that "no suit against a trustee in his lifetime shall be barred by any length of time," the claim is not inadmissible on the score of limitation.

The last question for our consideration is whether the defendant has not been put to a disadvantage by the non-reception of certain evidence by the Ṣadr Amín.

The Assistant Judge has held that the defendant has failed to prove that while in management of the village he sustained any loss; but it appears that the defendant was deprived of the opportunity of producing all his evidence on this point, by irregular and altogether unwarrantable procedure on the part of the Ṣadr Amín, before whom certain papers were produced by the Collector on the citation of the defendant, but because they were long and could not be copied in the course of one day, the Collector's subordinate was allowed to take them away again, and no copies have been placed on the record.

The Ṣadr Amín also declined to summon certain witnesses, for whose examination application was made long previous to the decision of the case.

(*c*) *Rádhábái* v. *Shámá*, 4 Bom. H. C. Rep., A. C. J. 155.

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'We are, therefore, of opinion that the decree of the lower court should be reversed, and the case remanded in order that the papers referred to may be taken into consideration, and the witnesses named in Darkhást No. 79 may be examined with the view to determine what amount the defendant is entitled to receive on account of any loss he may have sustained during his management of the village.

KEMBALL, J., concurred.

Decree reversed and suit remanded.

Special Appeal No. 231 *of* 1870.

Oct. 10.

NA'RA'YAN BA'BA'JI, *alias* NA'RA'YAN PURSHOTAM, and SUNDRA'BA'I .....(*Defendants*) *Appellants*:

NA'NA' MANOHAR *et al.* .....(*Plaintiffs*) *Respondents.*

Hindú Law—Adoption—Wife's Right to adopt—Sanction of Husband necessary—Recognised Authorities on Hindú Law—Opinion of Devanda Bhatta—Custom varying general Law—Strict Proof of Custom required—Partition—Joint Property—Burden of Proof.

According to the highest authorities in repute in the Maráthá country, the express sanction of the husband is indispensable to render valid an adoption made by the wife in his lifetime.

Comparative weight, as legal authorities on this side of India on the question of adoption, of the Mitákshará, Mayúkha, Dattaká Mímamsá, Dattaká Chandriká, Smriti Chandriká, Viramitrodaya, Dharmasindhu, and the Nirnayasindhu pointed out.

Dictum in the case of *The Collector of Madura* v. *M. Ramalinga Sethupati* (*a*) "that the opinion of Devanda Bhatta must have been that the assent of the husband stood upon precisely the same footing, and was of the same scope, in the cases of giving and receiving" (by the wife in adoption), questioned.

The general rule of Hindú law is that if a man die separate in estate from his kinsmen without leaving male issue or a widow surviving him, his daughters inherit his moveable and immoveable property. An alleged custom to the contrary with respect to any particular kind of property must be proved by ample and satisfactory evidence before the courts will admit it as established.

Although Hindú law presumes joint tenancy to be the primary state of a Hindú family, and the general rule is that the burden of proof that

(*a*) 2 Mad. H. C. Rep. 220.

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partition has taken place lies upon him who asserts it, there are exceptions to this general rule, *e.g.*, when it is admitted or proved that property in dispute was not acquired by the use of patrimonial funds, the party alleging such property to be joint must prove his averment. So, too, when it is admitted or proved that partition has already taken place, the presumption is that it has been a complete partition, and it lies upon a person alleging that family property, in the exclusive possession of one of the members of the family after such partition, is liable to be partitioned, to make good his allegation by proof.

THIS was a special appeal from the decision of F. D. Melvill, Acting Joint Judge of the Puṇá District, in Appeal Suit No. 10 of 1869, affirming (except as to costs) the decree of Kṛishṇaráv Sadáshiv, Ṣadr Amín at Solápur.

One Purshotam Chimṇáji, the natural brother of the plaintiffs, Náná, Chinto, and A'bá Manohar, had been adopted by his uncle Chimṇáji, and hence became first cousin to the plaintiffs. More than twenty years before the filing of the suit, Purshotam left his native country upon a pilgrimage, leaving behind him a wife, Ramábái, and an only daughter, the defendant Sundrábái. He never returned. Purshotam was entitled to a share in the proceeds of the offerings to the goddess Rukmini and the goddess Rádhiki, and also to two *varshásans*.

The present suit was instituted by the plaintiffs to establish their right to the abovementioned property of Purshotam. They alleged in their plaint that the whole family, including Purshotam, was joint; that Purshotam had absconded, and that his wife, Ramábái, had been maintained by them until her death. That on Ramábái's death the defendant Náráyaṇ obtained a certificate of heirship, on the ground that he had been adopted by her; but that Ramábái, her husband being alive, had no authority to adopt, and that the adoption was not performed in accordance with the Shástrás. They also relied upon an instrument (exhibit No. 109, dated 27th September 1865), executed in their favour by Ramábái previously to the adoption by her of Náráyaṇ, as either a will or a deed of gift made in their favour by Ramábái.

The defendant Náráyaṇ answered that he was the adopted son of Ramábái, the wife of Purshotam Chimṇáji, and that

the adoption was a valid adoption; that the property in dispute was not common family property, for that his adoptive father and mother enjoyed their share separately and independently, and that after them he was in the enjoyment of it; and that the plaintiffs' statement, that so much only of Purshotam's property as was sufficient for her maintenance was given to Ramábái, was untrue. An instrument of adoption, bearing date 2nd December 1865 (exhibit No. 7), was put in evidence by Náráyaṇ.

Sundrábái, the daughter of Purshotam, who was added as a defendant in the suit, answered that the property claimed by the plaintiffs had belonged to her father, Purshotam, who had been separate from the plaintiffs for many years; that he enjoyed his property till he absconded, and then that her mother, Ramábái, did the same; that she (Ramábái) adopted Náráyaṇ according to the Shástras, and with her (Sundrabái's) consent, and that, therefore, he became owner of the property; that otherwise she would have been the heir of Ramábái, and that the plaintiffs had no claim.

Ramábái did not put on mourning for her husband, but always lived as a wife, nor did she perform funeral obsequies for Purshotam, but about a month after her death, which took place about the 13th of December 1865, funeral obsequies for Purshotam were performed by his relations.

Náráyaṇ in his evidence stated that Ramábái had told him that she had sent people to make inquiries, and had got information of her husband within ten years, and that within six years certain pilgrims from Pandharpur, and again within three years certain pilgrims from Benáres, had brought her information of his existence. That to the people who had seen her husband on the first occasion he had said: "I will not *now* again come to Pandharpur; an adopted son should be taken, and the lineage and the *vritti* should be increased;" and that he gave the same directions to those who had seen him on the second occasion. Witnesses were called on behalf of the defendants to prove that they had seen Purshotam alive, and that he, through them, had given

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Ramábái authority to adopt, but they were disbelieved by the lower courts, and no mention of any authority to adopt given to Ramábái by Purshotam was made in the instrument of adoption (exhibit No. 7).

The Ṣadr Amín, upon issues laid down by him, found (I.) that the plaintiffs and Purshotam were separate in interests. It is true, he remarked, there is no *phárkat* in the case, but there is sufficient evidence to show the division of interest. (II.) That the defendant Náráyaṇ had not been adopted by Ramábái according to Hindú law, as the adoption was made by Ramábái not as a widow, but as the wife of a living husband (*savbhágyavati*), in which case the husband's consent was necessary, and that such consent had not been obtained by her, as he disbelieved the defendant's witnesses who said that they had seen the husband of Ramábái within the last ten years, and that he gave her permission to adopt a son, which permission they communicated to Ramábái. (III.) That the instrument executed in favour of the plaintiffs by Ramábái (exhibit No. 109) was a will, and that its execution was proved, and that it was not cancelled by the subsequent adoption of Náráyaṇ, as that adoption was invalid. And (IV.) that though exhibit No. 109 would not otherwise be binding on Sundrábái, she had consented to its execution, and that it was, therefore, binding upon her.

The Ṣadr Amín, accordingly, made a decree in favour of the plaintiffs, with costs to be borne by the defendants equally.

The defendants appealed from this decree to the Joint District Judge at Puṇá, who laid down the following issues for determination:—(I.) Had Ramábái authority to adopt Náráyaṇ, and if not, can the adoption now be set aside? (II.) Were the parties so divided in their interests, as far as the property in dispute is concerned, that the plaintiffs are not entitled to it by right of inheritance? (III.) If the adoption be declared null and void, does the property in question pass to Náráyaṇ under exhibit No. 7 (the instrument of adoption)? The District Judge held that as

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Ramábái, at the time of adopting Náráyan, considered herself a wife (*savbhágyavati*), and not a widow, she required her husband's authority to adopt, which she had not received. He decided the second issue in the negative, remarking—"The real question is whether the family was divided in respect of the property now sued for. It is not disputed that the family is divided in many respects, but it is urged by the plaintiffs that the property in question has not been divided, and that property of the kind now sued for, namely, the proceeds of offerings to certain deities, cannot, by the custom of the family, descend in the female line—that is, that Sundrábái can under no circumstances inherit now. I see no reason why the ordinary rule should not be followed in the present case, namely, that the party pleading separation and division of the property should prove their plea. It makes no difference whether the whole, or only a very small portion, of the family property remains to be divided; the presumption still remains that the property in question is joint family property, and it is for the defendants in the present case to prove that the property now sued for is not joint. This they have not done. It is unnecessary for me then to consider the question whether any particular custom has been proved which would prevent Sundrábái from inheriting the property in question." The Joint Judge found the third issue likewise in the negative, and affirmed the decree of the court of first instance, varying it, however, as to costs, as he found that the claim of the plaintiffs had been overvalued.

The special appeal was argued before WESTROPP, C. J., and GIBBS, J., on the 23rd and 24th of August 1870.

Shántárám Náráyan, for the appellants:—The adoption in this case was valid. Ramábái's husband must be presumed to have been dead at the time of the adoption: *Ghasee* v. *Jusondee* (*b*). It is true that she describes herself in exhibit No. 109 as *savbhágyavati*, but that is controlled by her subsequently stating that "her husband had gone on a

(*b*) 2 A'grá Rep. 226.

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pilgrimage; for many years there has been no trace of him —for twenty or twenty-five years." She speaks, too, of being owner of one half, and the plaintiffs as owners of the other half, of the family property, and alludes to her husband's property as "my property," "my house," and she says: "So long as I live, I myself shall be the owner, and shall keep the management, as I have hitherto done." These passages are inconsistent with the belief on her part that her husband was then alive. But, even assuming that Purshotam should be taken as then alive, Ramábái had still power to adopt, under such circumstances as existed in this case, without Purshotam's express consent. A wife, in the lifetime of her husband, may adopt without his express authority. In this case the Judge has held that she had no express authority. I have not been able to find any case in which the proposition I contend for has been upheld, but it is fairly deducible from the following authorities: I. Strange, H. L., pp. 79, 81, 82; Miták., Ch. I., Sec. 11, para. 9, and note thereto (*c*); Steele, Part I. (Law), para. 45, p. 54 (1st ed.); Part II. (Existing Custom), para. 45, p. 188 (1st ed.) The relations of Purshotam, though not his nearest kinsmen, have assented to this adoption. See too Strange's Manual, para. 66.

If the adoption is invalid, Purshotam's daughter is entitled to succeed to her father, as he and the plaintiffs were, partially at least, admittedly divided; and the admitted partial division of family property throws the *onus* of proving that the family, as regards the property now sued for, was undivided, upon the plaintiffs, and the *onus* is not, as the Judge has held it to be, upon Sundrábái to prove that it was divided: I. Strange H. L., pp. 232, 233; Grady H. L., p. 389; *Ram Gobind Koond* v. *Moulvie Syud Hossein Ali* (*d*); *Somangouda* v. *Bharmangouda* (*e*); S. A. 113 of 1862 (24th Jan. 1863).

Vishvanáth Náráyan Mandlik, for the respondents:—It is not open now to the appellants (defendants below) to

(*c*) Stokes' H. L. B., p. 415.

(*d*) 7 Calc. W. Rep., Civ. R. 90. (*e*) 1 Bom. H. C. Rep. 43.

contend that Ramábái was a widow. The defendant Náráyaṇ Bábáji states that Ramábái informed him that her husband was living, and witnesses have been called by him to depose to the same effect. He cannot now be permitted to allege that Purshotam was dead, and so the Judge has held. Besides, it is admitted that Ramábái never adopted the appearance of a widow or wore mourning. Purshotam must be taken, therefore, to have been alive. A wife cannot adopt in her husband's lifetime without her husband's assent: Manu, Ch. IX., pl. 168, 169. The words "with her husband's assent" in pl. 168 are a gloss of Kalluka Bhaṭṭa, and explain the meaning of the passage: Vyavahára Mayúkha, Ch. IV., Sec. V., paras. 1, 16, 17, 36 (*f*); Mitákshará, Ch. I., Sec. XI., para. 9, and note of Vasishṭha 15, 1, 2; Sutherland's Synopsis, Head I., para. 3 and note vi. (*g*); Steele, pp. 188 and 54 (1st ed.). It has been decided on the Bengal side that the authority given by the husband need not be in writing, but must be express. The true deduction from all the texts is that a wife must have her husband's express consent to adopt, but that a widow may adopt without such express consent, provided she has not been prohibited: I. Strange H. L. 78; II. *Ibid.* 84; Jagannátha's Digest by Colebrooke, Bk. V., Ch. IV., pl. 275 (*h*); Viramitrodaya, leaf 188 (Calc. ed., p. 2), last two lines: "While the husband is living, the son to whom he (the husband) does not consent cannot be made a son by the wife;" Kaustubha, leaf 44, p. 1, line 6 (lithographed ed., Bombay, of Shake 1783 [1861]): "The wife shall not give nor receive (a son in adoption) except by the command of the husband, (there is) a prohibition of acceptance by the woman." The case of *Rakhmábái* v. *Rádhábái* (*i*) was an adoption by a widow, not by a wife. The *onus* of proof in this case has been properly laid by the Judge on the defendants. We say that portion of the property of Purshotam was left with Ramábái for her maintenance, and that such property would have, upon Ramábái's death, reverted to the plaintiffs, had not Náráyaṇ obtained

(*f*) Stokes' H. L. B., pp. 58, 63, and 70. (*g*) *Ibid.*, pp. 664 and 672.
(*h*) p. 398, Madras ed. (1865). (*i*) 5 Bom. H. C. Rep., A. C. J. 181.

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a certificate of heirship to Ramábái as her adopted son. Hence the plaintiffs were compelled to sue him. Sundrábái was originally not a party to the suit. She was, however, subsequently joined, and took part apparently, with Náráyan, alleging that her father had been divided, and that Náráyan's adoption was made with her consent. We never admitted that there had been a partition, though there may have been separate occupation of parts of the joint estate, but this does not prove partition: *Bábúsheṭ* v. *Jirsheṭ* (*j*). The alleged will of Ramábái is not in fact a will, but an agreement relating to immoveable property, and, being unregistered, cannot have any effect given to it.

Shántárám Náráyaṇ, in reply, cited, on the question of a widow's right to adopt, *The Collector of Madura* v. *Muttu Ramalinga Satthupathy* (*k*), which was acted on in *Rakhmábái* v. *Rádhábái* (*suprà*). The Ṣadr Amín has found that there has been a partition; that finding was not objected to on appeal, and the Judge was, therefore, justified in holding that the partition was admitted.

Cur. adv. vult.

10th October. WESTROPP, C. J.:—In this cause the original plaintiffs, Náná Manohar, Chinto Manohar, and A'bá Manohar, are all deceased, but are represented by Bháu Aṇṇá, the son of Náná, and he (Bháu Aṇṇá) is the present respondent in this special appeal. The appellants are the original defendants, namely, Náráyaṇ Bábáji, *alias* Náráyaṇ Purshotam, and Sundrábái, only daughter of Purshotam Chimṇáji.

Dhoṇḍu, the grandfather of the three original plaintiffs, had two sons, named Manohar and Chimṇáji. Manohar had four sons, namely, the three original plaintiffs and Purshotam, who was adopted by his said uncle, Chimṇáji, and thereby, instead of remaining a brother of the plaintiffs, as born, became their first cousin, and was called Purshotam Chimṇáji. Purshotam Chimṇáji had a wife, named Ramábái, and, by her, a daughter, Sundrábái, the second defendant

(*j*) 5 Bom. H. C. Rep., A. C. J. 71.
(*k*) 10 Calc. W. Rep., P. C. 17.

and appellant. Purshotam Chimṇáji, several years ago—it is said so many as twenty or twenty-five years—left his native country and went upon a pilgrimage to Benáres and elsewhere, leaving his wife, Ramábái, and daughter, Sundrábái, behind him. Ramábái, up to the time of her death, treated him as still living; she never went into mourning for him, and described herself in the documents No. 109 and No. 7 (presently again to be mentioned) as "*savbhágyavati*," that is, the wife of a living husband. About eleven days before her death she adopted the first defendant, Náráyaṇ, as son to herself and her husband, Purshotam Chimṇáji. This adoption the defendant Náráyaṇ has (in his evidence in this cause taken in the Court of the Ṣadr Amín) alleged to have been made by Ramábái with the consent, and indeed by the direction, of her husband, Purshotam Chimṇáji, given by him within recent years; and Náráyaṇ examined witnesses for the purpose of proving that this was so. The Acting Joint Judge has nevertheless found, and apparently with good reason, that no such direction or consent was given by Purshotam Chimṇáji. By that finding this court is bound. Before the Acting Joint Judge, however, on appeal, and here on special appeal, it was attempted to be argued for the defendant Náráyaṇ that Purshotam Chimṇáji had not been heard of for twenty-five years previously to the adoption of Náráyaṇ, and that Purshotam Chimṇaji must, therefore, be presumed to have been then dead, and that the word "*savbhágyavati*" used by Ramábái in two documents executed by her, namely, exhibit No. 7 (the deed of adoption, dated 15th Márgshirsha Shudhya, Shake 1787, *i.e.*, 2nd December 1865), and exhibit No. 109,* dated Ashvin Shudhya 7, Shake 1787, *i.e.*, 27th September 1865 (which latter document, produced and relied upon by the original plaintiffs, was partly in the nature of a will and partly of a deed) was not to be rendered according to its literal meaning, which is "the wife of a living husband."

* This exhibit is, by mistake, referred to by the Acting Joint Judge in his judgment as No. 107.

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We, however, concur with the Acting Joint Judge in holding that the defendant Náráyaṇ cannot be permitted thus to shift his course in the higher courts. The plaintiffs objected to the validity of the adoption of Náráyaṇ, on the ground that Ramábái must be regarded as a wife, and not a widow, at the time of the adoption, and that the death of Purshotam could not be presumed to have taken place until afterwards. In fact, neither the plaintiffs nor the defendant Náráyaṇ went into mourning for Purshotam Chimṇáji until about one month after Ramábái's death. Both parties have chained themselves to the assertion that Purshotam Chimṇáji survived Ramábái. Assuming then, as we are bound to assume, that this was so, Ramábái, even if Purshotam Chimṇáji were completely severed, as regards property, from the original plaintiffs, would not have had any power whatever, either by will or deed, to deal with, or create any estate in, his property.

But Mr. Shántárám, for the appellants, though admitting that he could not quote any case in which it had been ruled that an adoption by a wife, in the lifetime of her husband, without his express assent, is valid, contended that, under the special circumstances existing in this case, such a proposition might be maintained upon the authority of writers on Hindú law. He cited the following passage from 1 Stra. H. L. 81, 82:—"Of her own mere authority, the mother cannot in general *give* her son to be adopted, any more than she can adopt, her husband living; *unless he have emigrated*, or entered into a religious order. But his assent may be presumed: and after his death she does not want it, a widow having this power, and a wife also if the distress be urgent." At page 79 of the volume, however, Sir Thomas Strange admits that a wife cannot adopt without the authority of her husband. And the passage at pp. 81, 82, cited by Mr. Shántárám, plainly relates to the giving, and not to the taking, of a son in adoption. This becomes still more apparent by referring to the Dattaka Chandriká, Sec. I., plac. 31, 32, whence the allusion to emigration is taken. The passages are these: 31. "But by a woman *the gift* may be made with her hus-

band's sanction if he be alive; or even without it if he be dead, *have emigrated*, or entered a religious order. Accordingly Vasishtha: 'Let not a woman either give or receive a son unless with the assent of her husband.'" 32. "Now if there be no prohibition even there is assent; on account of the maxim, 'The intention of another, not prohibited, is sanctioned.' Yájñavalkya suggests the independency of the woman: 'He whom his father or mother *gives* is a son *given*.' Also in another place: 'deserted by his father and mother, or either of them.'" A passage in the very learned and able judgment of the High Court of Madras in *The Collector of Madura* v. *Ramalinga Sethupati* (*m*) was referred to, as showing that "the opinion of Devanda Bhaṭṭa must have been that the assent of the husband stood upon precisely the same footing, and was of the same scope, in the cases of giving and receiving: for if the words of Vasishtha require this explanation in the one case (that of giving), they require it in the other;" and, therefore, it was argued here that Devanda Bhaṭṭa must be considered as an authority for the proposition that if a man without male issue emigrated, his wife might, in his absence and without his sanction, adopt a son. I adhere to the opinion expressed by me in 1866 in the Khándesh adoption case *Bayábái* v. *Bálá urf Venkaṭesh Rámákánt* (*n*), in which the construction given to the above-quoted passages from the Dattaka Chandriká by the High Court at Madras was much discussed. My observations were these:—"After a careful consideration of the remarks of the High Court of Madras (2 Mad. H. C. Rep. 219, 220), and with all due respect to the note at page 68, 1 Macn. H. L., I think that Devanda Bhaṭṭa ought not to be held responsible for anything more than he actually did say. The two placita immediately preceding pl. 31 and 32, above quoted, from the Dattaka Chandriká, show that he was there dealing with the case of giving only. They are these:—'29. In answer to the question by whom is a son to be *given*? Caunaka declares: "By no man having an only son is the *gift* of a son to be ever made. By a man having several sons, such *gift* is to be an-

(*m*) 2 Mad. H. C. Rep. 219, 220. (*n*) *Post*, Appx., p. 1.

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xiously made." 30. "The author, apprehending an extinction of lineage in case of the *gift* of a son by one even having two sons, says, 'by one having several sons.'" The 4th and 7th placita of the same section (1), referred to in the judgment of the Madras High Court, do not seem to support the conclusion to which it came as to the views of Devanda Bhaṭṭa. On the contrary, the concluding portion of the 7th plac.—'Women, with the sanction of their husbands, are competent to adopt: as Vasishṭha shows: 'Let not a woman either give or receive a son in adoption, unless with the assent of her husband,'" where Devanda Bhaṭṭa treats of the competency of a woman to take in adoption—furnished him with a suitable opportunity to express, if he entertained it, the opinion attributed to him by the High Court of Madras. The fact that he not only carefully refrained from giving utterance to such a doctrine, but when again, in plac. 24 of the same section, he touches upon receiving in adoption by a woman, he says, as already above mentioned: 'So also, in the case in question, the affiliation of a son, by a woman *proceeding legally, with the sanction* of her husband, to constitute for him male issue, only takes place where no son of that person may exist,' and thus treats the husband's sanction as necessary to the taking in adoption; and the further fact that, in the passage quoted by that court from the Smriti Chandriká (namely: 'The objector says that the gift of a son by his mother is not proper, notwithstanding her power. The reason of this is her want of independence. Refutation:—True, but it is right if it be authorised by an independent male. Hence only Vasishṭha says: "No woman shall give or receive a son unless with the permission of her husband.") the same learned commentator (Devanda Bhaṭṭa) exhibited the like abstinence, lead strongly to the conclusion that his intention was to expand the text of Vasishṭha only so far as it related to the giving of a son. I should say that Devanda Bhaṭṭa is doubly entitled to the benefit of the rule *expressio unius est exclusio alterius*, he having twice expressed himself in favour of the expansion of the text of Vasishṭha in the case of a woman giving a son, and preserved a rigid silence on each

occasion as to any such expansion being proper in the case of a woman taking a son in adoption. His glosses upon that text are open to this further—and, I humbly conceive, conclusive—remark, that throughout them he avoids making any distinction between a wife and a widow, and if those glosses be intended to comprise as well the taking as the giving in adoption, he must be considered as sanctioning a taking in adoption, without the authority of her husband, by a wife, as well as by a widow: for his remarks as to giving in adoption include both wife and widow; whereas no Hindú jurist of reputation has, so far as I can discover, ever affirmed that a wife may, without the authority of her husband, take a son in adoption. It is vehemently improbable that Devanda Bhaṭṭa would have gone to such a length. Had he done so, the result of his comments would, instead of an explanation, have been a complete contradiction of Vasishṭha's text—an intention which, without very clear proof, ought not to be attributed to the commentator, and which he was not likely to leave to mere implication. Assuming, however, that my view of the meaning of Devanda Bhaṭṭa is not well founded, it must be remembered that his work, the Dattaka Chandriká, though it may rank higher in the Dravida country than the Dattaka Mímaṁsá of Nandá Paṇḍita, is inferior in authority to the latter in Maháráshṭra, and, in cases of conflict, does not there prevail against it, except when supported by other authorities of high standing, which is, in such instances of difference, sometimes the case. Of the Dattaka Mímaṁsá, Mr. Sutherland, in the Preface (p. ii., 1st ed.; p. 527, Stokes' ed.) to his translations of it and of the Dattaka Chandriká, says that 'The Dattaka Mimansa is the most celebrated work extant on the Hindú law of adoption.' Mr. Colebrooke, in his letter to Sir John Royds, printed at pp. 132, 133 of Vol. 2 Stra. H. L., says: 'The Datta Mimansa is, no doubt, the best treatise on Hindú adoption.' It appears to be included in the Puṇá Catalogue of Authorities printed by Mr. Steele, * though somewhat disguised in spelling as 'Dut Meemans,' and is stated by him to be a work well known in the Carnatic Country; but neither the Dattaka Chandriká nor the Smṛiti Chandriká is included in

* p. 22, 1st ed.; p. 18, 2nd ed.

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the Puṇá or the Khándesh Catalogue, and the omission of the lastmentioned work is noticed by Mr. Steele. * In Maháráshtra, however, both the Dattaka Mímansá and Dattaka Chandriká must yield in authority to the Mitákshará, and generally also to the Vyavahára Mayúkha."

Since my judgment in the Khándesh adoption case was given, from my notes of which the above remarks have been extracted, the case of *The Collector of Madura* v. *Ramalinga Sethupati* has been heard on appeal in the Privy Council. The judgment refers to the Dattaka Chandriká thus: "The Dattaka Chandriká (Sec. I., Articles 31 and 32) allows a widow *to give* a son in adoption where her husband has not forbidden her to do so, implying his assent from the absence of prohibition. The Smṛiti Chandriká also permits a mother to give her son if she be authorised to do so by an independent male. *And it is argued* that what these two last authorities lay down concerning a widow's right to give, must by parity of reasoning be taken to be laid down concerning her right to receive, a son in adoption." † We do not understand that, by that cautious mode of referring to the argument of counsel, their Lordships of the Judicial Committee are to be regarded as having implicitly adopted that argument as a correct exponent of the doctrine of Devanda Bhaṭṭa. Portions of the valuable work of Messrs. West and Bühler have also been published since the Khándesh case was decided. From the Introduction (p. ii.) to the first Book we take the following passage:—"The relative position of these works to each other may be described as follows: In the Marâṭhâ Country and in Northern Kânarâ the doctrines of the Mitâksharâ are paramount; the Vyavahâra Mayûkha and the Viramitrodaya are to be used as secondary authorities only. They serve to illustrate the Mitâksharâ and to supplement it. But they may be followed so far only as their doctrines do not stand in opposition to the express precepts or to the general principles of the Mitâksharâ. Amongst the secondary authorities the Vyavahâra Mayûkha takes precedence of the Viramitrodaya. The Dattaka Mîmaṁsâ and Dattaka Chandrikâ,

* pp. 24, 25, 1st ed.; p. 19, 2nd ed.

† 10 Calc. W. Rep., P. C. 22.

the latter less than the former, are supplementary authorities on the law of adoption. Their opinions, however, are not considered of so great importance, but that they may be set aside on general grounds, in case they are opposed to the doctrines of the Vyavahâra Mayûkha, or the Dharmasindhu and Nirṇayasindhu." We have quoted the passage in full, but wish to reserve our opinion as to the weight of the Dharmasindhu and Nirṇayasindhu as *legal* treatises. In their list of Hindú law-works (p. i.), Messrs. West and Bühler give precedence to the Nirṇayasindhu over the Dharmasindu. At p. ii. they also discuss their value on questions of ceremonies and penances. At p. iii. they mention that in Gujarát in some cases the Vyavahára Mayúkha is preferred to the Mitákshará.*

Before stating the views of Nanda Pandita in his Dattaka Mímaṁsá, it is convenient to refer to those of some other writers.

Manu † is silent as to adoption by a woman, either as wife or widow. As to *giving* in adoption he says: "He whom his father or mother gives to another as his son, provided that the donee have no issue, if the boy be of the same class and affectionately disposed, is considered as a son given by water:" Ch. IX., pl. 168. Sir William Jones, in his translation of Manu, inserts in italics after the word "mother" in that text the words "with her husband's assent"—a gloss, apparently, of the celebrated commentator Kalluka Bhaṭṭa (see preface to Sir W. Jones' translation of Manu, p. xviii., and 3 Dig. [Jagannátha], p. 261, pl. cclxxv., Ch. IV., Bk. V.) In the next placitum (169), Manu, in speaking of the "son made," says: "He is considered as a son made whom a man takes as his own son," &c., and does not suggest the intervention of the taker's wife.

The Mitákshará, which stands foremost amongst legal authorities in Mahárâshṭra, ‡ is also silent as to adoption

* See also West & Bühler, Bk. I., p. 138.

† As to his great authority in this Presidency, see 1 Bom. H. C. Rep. 131.

‡ Borradaile's Preface to the Mayúkha; Colebrooke's Preface to the Miták. and Dáyá Bhága; Steele, Preface, p. vi., 1st ed.; *Ibid.* p. 26; Elberling, pl. 33.

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by a woman. Ch. I., Sec. XI., relating to sons by birth and by adoption, opens with a passage (pl. 1) from Yájñavalkya, presenting the same contrast as contained in the quotations just now made from Manu: "He whom his father or his mother gives for adoption shall be considered a son given. A son bought is one sold by his father and mother. A son made is one adopted by the man himself." Here the writer mentions the wife of the giver as intervening, but says nought of the wife of the taker. As to giving, he further says, at pl. 9 of the same section: "He who is given by his mother with her husband's consent while her husband is absent, or after her husband's decease, or who is given by his father, or by both, being of the same class with the person who is given, becomes his given son (dattaka);" and then the author quotes Manu. Certain interpolations from Bálambhaṭṭa (omitted above) have been made in that text of the Mitákshará, of which interpolations it is unnecessary here to say more than that they are in extension of the mother's power. Mr. Shántárám Náráyaṇ, on behalf of the alleged adopted son, referred to the doctrine attributed by Mr. Colebrooke, in his note upon that text of the Mitákshará, to Bálambhaṭṭa, and argued that Bálambhaṭṭa drew no distinction between the power of a wife and that of a widow in taking a son in adoption. As to that argument, we must first observe that it is stated at pp. 24, 25, 1st ed.,* and p. 19, 2nd ed., of Mr. Steele's work on the law and custom of Hindú castes, that Bálambhaṭṭa is amongst the names omitted in the catalogue of authorities held in regard at Puṇá. The present is a case from the Puṇá zillá. Messrs. West and Bühler's Introduction to the 1st Book of their Digest contains the following notice of Bálambhaṭṭa: "The explanation of the Mitâkharâ is facilitated by two Sanskrit commentaries, the beforementioned Subhodinî of Vis'ves'varabhaṭṭa, and the Lakshmîvyâkhyâna, commonly called Bâlambhaṭṭaṭika, the work of a lady, Lakshmîdevi, who took the *nom de plume* of Bâlambhaṭṭa. Vis'ves'vara's comment explains selected passages only, whilst Lakshmîdevi gives a full verbal interpretation of the Mitâk-

* See also his Preface, pp. vi., vii., 1st ed.: p. viii., 2nd ed.

Bharâ, accompanied by lengthy discussions. She generally advocates latitudinarian views, and gives the widest interpretation to every term of Yâjñavalkya. Instances of this tendency may be seen in the quotations given: Introd. Rem. to Dig., Ch. II., Secs. 14 and 15. But her opinions are held in small esteem, and hardly ever brought forward by the Shâstris, if unsupported by other authorities. Her commentary is generally considered as a performance highly creditable to the female intellect, but as showing a good deal the author's intellectual petticoats." We may add that she frequently betrays too strong a bias in favour of the claims of her own sex. Some further information as to this commentatrix is to be found at page 359 of Messrs. West and Bühler's work, Bk. I.

The Smṛiti text of Vasishṭha, * "Let not a woman either give or receive a son in adoption, unless with the assent of her husband," to Devanda Bhaṭṭa's commentary on which we have already referred, is also discussed by Nandá Pandita in his Dattaka Mímaṁsá, Sec. I., pl. 15 to 29. He maintains that text in its integrity, indeed in its widest possible meaning; admitting that the wife may, with the assent of her living husband, adopt (pl. 27), but denying the competency of the widow to adopt at all, even with the assent of the kinsmen, because he says "the assent of her husband is impossible" (pl. 16), and "the term 'husband' would become indefinite, and the purpose would not be attained," if the assent of the kinsmen were accepted in lieu of his consent (pl. 18).

The Vyavahára Mayúkha by Nilakaṇṭha (which ranks next in authority in the west of India and in the Maráṭhá school to the Mitákshará, † and to a certain extent differs from the Dattaka Mímaṁsá on the law of adoption) having dealt with

* See 3 Jagannátha's Digest, Bk. V., Ch. IV., pl. cclxxiii., p. 242 *et seq.*, 253, 261.

† Per Mr. Colebrooke in 1 Stra. H. L. 318; Colebrooke's Preface to Miták., p. iv., 1st ed.; p. 173, Stokes' ed.; Elberling, pl. 33; 1 Bom. H. C. Rep. 68, 122, 127, 131, 211; 5 *Ibid.* 185 A. C. J.; West & Bühler, Bk. I., Introd., pp. ii., vi., *et seq.*; Borradaile's Preface to the Vyavahára Mayúkha, pp. i., vi., *et seq.*; 1 Macn. H. L. 35.

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that law, so far as it touches the rights of women, more fully than the Institutes of Manu or the Mitákshará, is the most important treatise to which resort can be had upon the present occasion. At pl. 15 of Sec. V., Ch. IV., the right of women to celebrate the acceptance of a son, through the instrumentality of a Bráhman, with a Homa, is admitted. At pl. 16 Vasishṭha's already mentioned text is recited. Plac. 17 and 18 are as follows :—17. "*Therefore, if there must be an order from the husband, it is for a married woman only, as above shown;* but for a widow, even without it, adoption may be made with the permission of her father, or, on failure of him, of the relations (*Nyati*), under this precept: 'Let a female be taken care of by her father while a child, by her husband when married, and by her sons in her old age. If none of these exist, let her other relations (*Nyati*) take care of her. A woman is never fit for independence.' This has been declared by Yájñavalkya only with reference to difference of age, and the circumstances of a woman being under the power of her husband. In case of his being dead, or (unable) from old age, or other (disqualification), or from helplessness, then (she is) indeed under the power of her sons or other relations." 18. "By Kátyáyana also it has been said: 'If a woman, without the orders of her father, husband, or son, should perform obsequies, such obsequies are of doubtful validity.' What is here said of the orders of her father, husband, &c., relates only to the difference of age. Obsequies here means rites performed for the other world; wherefore, at whatever age a married woman may (require to) receive the command of her husband, that very command is in the case of a widow not required, since the command of any other person, not here mentioned, is nowhere declared requisite. Therefore, the right of adoption, even without the order of her (late) husband does pertain to a widow."

Here then we have a clear distinction taken between the wife and the widow. For the former the "order" or "command" of the husband is held to be indispensable in order to entitle her to adopt, whereas in the case of a widow the author says that it is unnecessary. The use by Nilakantha,

in the above passages, of the phrases "order" or "command," and not of the word "consent," was mentioned by me in the Khándesh case as particularly worthy of notice. It appeared to me that adoption, whether by the wife or the widow, in every case depended on the consent of the husband, but that some schools, in the case of adoption by the widow, in consideration of the spiritual benefit supposed to result to him by adoption, dispensed with an express direction, or authority, from the husband, and allowed that his consent might be implied. And that even the Maráṭhá school, which has perhaps gone furthest in permitting adoption by the widow, admitted that, if the husband in his lifetime prohibited adoption, she could not adopt after his decease, and, by making that admission, conceded that the adoption by the widow in the absence of express authority from him, proceeded upon his implied consent, for if this were not so, his prohibition should be regarded as futile.

There are manifest reasons why a distinction should be made between the wife and the widow. Were a wife to be permitted to adopt in her husband's lifetime without his express order, she might adopt some person hostile or obnoxious to him; or the husband, if in a distant part of the country, might, in ignorance that the wife had already adopted, or was about to adopt, a son for him, adopt another for himself. To prevent such a dilemma from arising, the doctrine of Nilakantha, that a wife cannot adopt without the order or command of her husband, seems highly reasonable, and necessary. So long as he lives, the argument as to spiritual necessity does not apply, and when he dies, if he die without male issue, the now apparently (though not without considerable opposition) judicially established usage, as well as juridically established doctrine, amongst the Maráthás, permits his widow, even without his order or command, to adopt for him, provided he has done nothing to destroy the implication of his consent. In the Dravida country the consent of kinsmen would appear also to be necessary, according to *The Collector of Madura* v. *Ramalinga Sethupati* (*o*). There is

(*o*) 10 Cal. W. Rep., P. C. 17; 2 Mad. H. C. Rep. 206.

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a recent decision in this court by Couch, C. J., and Newton and Warden, JJ. (*Rakhmábái* v. *Rádhábái* (*p*),) which lays down that, in the Maráṭhá Country, even the consent of the kinsmen of the husband is not essential to adoption by a widow, provided the act of adoption is done in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. How this may be, it is quite unnecessary for us now to express any opinion.

Were consent of relatives an element of importance in this case, it could not be contended that the consent of Purshotam's daughter, Sundrábái, and her husband, would suffice where the adoption has not been assented to by Purshotam's three nearest male relations, the original plaintiffs. I have been happy to find the view which I expressed in the Khándesh case—that, if there be not express assent, there must at least be implied assent, on the part of a husband, to validate adoption by the widow—has been since put forward by Couch, C.J., on behalf of himself and his colleagues, in *Rakhmábái* v. *Rádhábai* (*q*), and in the judgment of the Privy Council in the Madras case already mentioned that view is maintained with admirable perspicuity thus:—"All the schools accept as authoritative the text of Vasishtha which says, 'Nor let a woman give or accept a son unless with the assent of her lord.' But the Mithilá school apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and, therefore, that a widow cannot receive a son in adoption, according to the Dattaka form, at all. The Bengal school interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the Mayúkha and Kaustubha, treatises which govern the Maráṭhá school, explain the text away by saying that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus, upon a careful review of all these

(*p*) 5 Bom. H C. Rep., A. C. J. 181.
(*q*) *Ibid.* 193.

writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband" (*r*). And further on it is said: "Again, it appears to their Lordships that inasmuch as the authorities in favour of the widow's power to adopt with the assent of her husband's kinsmen proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family, which afford no plea for a supercession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites" (*s*). This necessity for the consent (express or implied) of the husband is because the act of filiation is on his behalf: Sutherland's Synopsis, Head I.; 1 Stra. H. L. 78, 79, 80; 2 *Ibid.* 88, 91, 94, 98, 111, 116.

Recapitulating the Hindú authorities held in highest repute here as to adoption by a *wife*, we find Manu and the Mitákshará silent as to adoption by any woman; Vasishṭha allowing adoption by a woman with the consent of her husband; Devanda Bhaṭṭa, reciting the text of Vasishṭha, and if our opinion be right, leaving that text uncontroverted and unexplained so far as it relates to a taking in adoption by a woman; Nandá Paṇḍita reciting the same text, and admitting that a wife may, with the assent of her husband, adopt, but denying that a widow can adopt at all, because she cannot, as he says, obtain the consent of her husband; and Nilakaṇṭha, whose authority, amongst those who have actually written on the point, stands highest here, also reciting the text of Vasishṭha, and requiring the order or command of the husband to the wife, but dispensing with it in the case of the widow, and substituting for it the consent of kinsmen.

(*r*) 10 Calc. W. Rep., P. C. 21. (*s*) *Ibid.* 24.

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Thus, upon the highest authorities in repute here, so far as they have spoken, the express sanction of the husband is indispensable to render valid an adoption made by the wife in his lifetime.

Other authorities of value in this Presidency have been cited to the same effect: Viramitrodaya, fol. 188: "While the husband is living, he to whom the husband does not consent, cannot be made a son by the wife;" also the Vyavahára Kaustubha, fol. 44, line 6 (Bombay ed., Shake 1783); the Dattaka Darpan (or Mirror of Adoption), quoted in 2 Borradaile's Reports, 2nd ed., 492, thus: "A husband's commands to adopt are required for a married woman, but for a widow to adopt without such command, the permission of her father, or if he be not alive, then of the caste (Nyati), must be obtained;" and 1 Strange's H. L. 79, and 1 Borradaile Rep. 211 (2nd ed.). The wife and widow are mixed up in a somewhat confused way at p. 54, plac. 45, in Steele, 1st ed. (pp. 47, 48, 2nd ed.), but this is merely an inaccurate quotation from the Mayúkha. At page 188, plac. 48, 1st ed. (page 187, 2nd ed.) of Steele, is this passage: "A wife, in case of her husband's continued absence, when no hope remains of child-bearing, may adopt by his written order; or, after the period has expired when she puts on the appearance of widowhood, she may adopt as his widow." It is admitted in this case that Ramábái never put on mourning, or permitted others to treat her as a widow. The course which she and Náráyaṇ Bábáji have pursued compels us to regard the adoption attempted here as the act of a woman whose husband was then living. That act was unauthorised by him.

We have, therefore, without doubt arrived at the conclusion that Náráyaṇ Bábáji, the first defendant and appellant, is not the adopted son of Purshotam Chimṇáji. We have already said that Ramábái could not bind the property of her husband by deed or will in his lifetime; hence the attempt, on behalf of Náráyaṇ Bábáji, to lean on exhibit No. 7 as a will, must fail, as also the attempt of the plaintiffs to rely on exhibit No. 109, alleged to have been executed by her previously to the adoption. It is an instrument which, if it

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be treated as a deed, is open to the objection that it is unregistered, and which, whether it be deemed a will or a deed, she, as a wife, had not any power to make with reference to the property of her husband. If that property be immoveable, she, even as a widow, would not have had power to alienate it for any period extending beyond her lifetime, except for the special and limited purposes sanctioned by Hindú law.

All claims on the part of Náráyaṇ Bábáji, the alleged adopted son, and all claims by the plaintiff under exhibit No. 109, having been disposed of, the case remains to be considered on the question of inheritance as between Sundrábái and the plaintiffs. Were this ordinary moveable or immoveable property, Ramábái being considered to have predeceased Purshotam Chimṇáji, and he not having any son, Sundrábái, his daughter, would succeed to that property as his heir, if he were separate in estate from his kinsmen. It, however, is alleged that the property, the subject of this suit, is of such a nature that females cannot inherit it. Upon that question the Acting Joint Judge has not come to any finding, and it will be necessary to remand the cause for the decision of that point. In considering it, the court below should recollect that the property in dispute here is of two species: 1st, offerings to goddesses; 2nd, *varshásans;* and though the alleged custom may be applicable to one, it may not be so as to the other. It will be for the court below to ascertain and say whether the alleged custom is applicable to either, and, if so, to which. That court should further recollect that the general rule of Hindú law is that if a man die separate in estate from his kinsmen, and without leaving male issue or a widow surviving him, his daughters inherit his moveable and immoveable property. If any person shall aver a custom to the contrary with respect to any particular kind of property, the burden of proof of such custom lies upon him, and ample and satisfactory evidence is necessary before the court ought to admit as established any variation from the general rules of law regulating the devolution of property amongst Hindús. Were the court not to look with a jealous eye at attempts to establish local or caste customs in dero-

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gation of the general canons of descent amongst Hindús, the exceptions would soon become as frequent as the rule; and *misera est servitus ubi jus vagum est.* However, if the evidence of an uninterrupted general custom be satisfactory and above suspicion, the court is bound to give effect to the custom.

Before deciding the question of custom as to the exclusion of females from inheriting property such as that in suit here, it will be necessary for the court below to ascertain whether or not that property (which consists of one-sixteenth of the offerings to the goddess Rukmini in her temple at Pandharpur, and one-sixteenth of the offerings to the goddess Rádhiki and two *varsháśans*) were held by Chimnáji, or by his adopted son, Purshótam, in severalty, or jointly with the plaintiffs. The Acting Joint Judge said: "I see no reason why the ordinary rule should not be followed in the present case, namely, that the party pleading separation and division of the property should prove their plea. It makes no difference whether the whole, or only a very small portion, of the family property remains to be divided; the presumption still remains that the property in question is joint family property, and it is for the defendants in the present case to prove that the property now sued for is not joint." We are unable to adopt these observations of the learned Judge. It is true that the Hindú law presumes joint tenancy to be the primary state of a Hindú family, and hence it follows that the burden of proving that partition has taken place, as a general rule, lies upon him who asserts it: 1 Strange, H. L. 225; 2 Knapp, P. C. C. 60; 3 Moo. Ind. App. 229, 240; 6 *Ibid.* 53; 9 *Ibid.* 539; 10 *Ibid.* 403; 11 *Ibid.* 369; 6 Calc. W. Rep., 58; 5 Bom. H. C. Rep., A. C. J. 71. But there are exceptional cases in which the burden of proving jointure of estate is cast upon the party who alleges that the estate is joint. For instance, where a plaintiff has admitted, or where it appears *aliunde*, that property in dispute between him and the defendants, members of his family, was not acquired by the use of patrimonial funds, and the defendants have not acknowledged that such property was acquired by any joint exertion of the plain-

tiff, the mere circumstance of commensality (union in food) existing between the parties at the time of the acquisition does not relieve the plaintiff of the burden of proving his averment, that he had a joint share and interest in the acquisition: *Kishoree Lall* v. *Chummun Lall* (*t*), *Mt. Soobedhur Dossee* v. *Boloram Dewan* (*u*): and see *Kaleepershaud Roy* v. *Degumber Roy* (*v*). Another instance, where the burden of proof lies upon the party asserting that the property in dispute is undivided, is where he admits, or it clearly appears *aliunde*, that a prior division of family property has taken place: *Ram Gobind Koond* v. *Moulvie Syed Hossein Ali* (*w*); *Somangouda* v. *Bharmangouda* (*x*); 1 Stra. H. L. 230, 232, 233; Grady H. L. 317, 389; *Maharajah Hetnarain Sing* v. *Modnarain Sing* (*y*); West & Bühler, Bk. II., Introd., p. xv. The present case is of that latter kind. It is unnecessary for us here to enter into the consideration of the circumstances which, according to Hindú law, amount to a partition. There may perhaps, as apparently suggested by Messrs. West and Bühler in the part of their work just referred to, be some difficulty in reconciling with each other the reported decisions on that question, and, as each new case arises, cautious discrimination may be requisite in order to arrive at a satisfactory conclusion. But in the present case it has, we think, been clearly admitted, on behalf of the original plaintiffs, that there has been at least a partial division of the family property. The Ṣadr Amín found that such was the fact, and no objection upon that point was taken by the plaintiffs to his decree. The Acting Joint Judge was warranted in holding, as he did, that before himself it was admitted that such a partial division had taken place, and no memorandum of objection to that holding by him has been filed by the respondent (plaintiff) in this court. When, under such circumstances as these, a member of a family is found in exclusive possession of a portion of the family property,

(*t*) Calc. S. D. A. Rep. 1852, p. 111.
(*u*) Calc. W. Rep., Special No. F. B. R. 1862 to 1864, p. 57.
(*v*) 2 Macn. S. D. A. Rep. 237, A.D. 1817.
(*w*) 7 Calc. W. Rep., Civ. R. 90. (*x*) 1 Bom. H. C. Rep. 43.
(*y*) 7 Moo. Ind. App. 311, 321; S. C. 3 Calc. W. Rep., P. C. 51.

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as Purshotam and (during his absence and on his account) Ramábái were here, the burden of showing that the portion in dispute was not allotted to that member of the family as his separate share, or as a part of it, falls upon those who contend that such portion was not taken into consideration at the partition which did take place, and that the same portion still remains common to all of the parceners. The reason for this is that Hindú law lays down as a general rule that "once is the partition of an inheritance made:" Manu, Ch. IX., pl. 47; and the court will not presume that this rule has been violated, and will itself strictly observe it by refusing to make a partial division of undivided property: *Nánábhái Vallabhdás* v. *Náthábhái Haribhái* (*z*), West & Bühler, Bk. II., Introd. xvii. All of the parceners should be made parties to a suit for partition: 12 Calc. W. Rep., Civ. R. 256. Privately, no doubt, partial divisions are not unfrequently made, and whether it be by fraud of one or more of the parceners, or by ignorance of the existence of a part of the family property, or by special arrangement, that a part of it remains undivided, the court will, on due proof that there is an undivided residue, entertain a suit for the completion of the partition by making a division of that residue: Manu, Ch. IX., pl. 218; Mayúkha, Ch. IV., Sec. VII., pl. 24, 26, 36; Dáyá Bhága, Ch. XIII.; Miták. Ch. I., Sec. IX.; Dáyá Krama Sangraha, Ch. VIII.; Vivada Chintamaṇi (Prossonno Coomar Tagore's translation), pp. 241, 270; Steele, Tit. Partition, pp. 66, 223, 1st ed.; pp. 60, 223, 2nd ed.; Smṛiti Chandriká (Kristnawmy Tyer's translation, 2nd ed.), Ch. XVI., pp. 232, 235; and see *Ibid.*, Ch. XVI., pl. 3, 14, 18, 19, 20, pp. 238, 241, 242; Elberling, pl. 209; West & Bühler, Bk. II., Introd, pp. xvii., xviii., and Ch. III., Sec. 2, p. 39; Sec. 4, p. 51; 1 Strange H. L. 230, 231, 232, 233.

For these reasons we think that the learned Judge was in error in throwing upon the appellant (defendant) Sundrábái the burden of proving that there had been a partition between Purshotam or his adoptive father, Chimnáji, on the one side, and the original plaintiffs on the other, under

(*z*) 7 Bom. H. C. Rep., A.C.J. 46.

which the property in dispute had been allotted to Chimṇáji or to Purshotam. We hold that the burden of showing that the property in dispute was not allotted to Chimṇáji or to Purshotam at the partition of the family property, which is admitted to have taken place, must be put upon the present plaintiff (respondent).

As we must remand the suit on this and the other question already mentioned, as to whether Sundrábái as a female is excluded from inheritance, and for a fresh decision on the merits, we are of opinion that, although to a certain extent we concur with the learned Judge, and also to a certain extent with the Ṣadr Amín, who has taken a great deal of trouble and shown much learning in this cause, especially on the question of adoption, the better course for this court to adopt will be to reverse the decrees of the courts below. The court which hears the cause on the new trial should of course be at liberty to take such new evidence, oral and documentary, as justice may require, should also make a fresh decree upon the two questions referred to it only, and as to the costs of the suit and of this appeal, and in so awarding costs should have regard to the fact that the defendant Náráyaṇ Bábáji has failed to establish any defence in this suit. Our decree disposes of the question of adoption, and of all claims sought to be founded on the exhibits No. 7 and No. 109.

We think that it was a very inconvenient course to instruct only one Pleader for the defendants Náráyaṇ Bábáji and Sundrábái. Their interests were clearly conflicting, and ought to have been separately represented. Henceforward, however, Náráyaṇ Bábáji's interest in the suit, save so far as regards costs, is at an end.

The decree was made in the following terms:—

"Reverse the decrees of the Acting Joint Judge and of the Ṣadr Amín. Declare that the adoption of the defendant Náráyaṇ Bábáji is invalid, and of no force or effect in law, and that he does not take any estate or interest whatever in the property the subject-matter of this suit, either under

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the exhibit No. 7 dated the 15th Márgshirsha Shudh, Shake 1787 (2nd December A.D. 1865), or any other exhibit filed in this cause. Declare that the Acting Joint Judge was in error in placing upon the defendant Sundrábái the burden of proving that, as regards the said property in dispute, Purshotam Chimṇáji was separated from the original plaintiffs. Remand the cause for a new trial on the two following questions, namely, 1st, whether, as regards the said property in dispute, the said Purshotam Chimṇáji was divided from the original plaintiffs, and let the burden of proof that he was not so divided be cast upon the present plaintiff; and 2nd, whether, according to the custom of the country, the defendant Sundrábái, as a female, is excluded from inheriting the said property in dispute, or any part thereof. And in trying the said questions let the court below have regard to the judgment, a copy of which is sent herewith. And let the decree be made in accordance with the finding on the said questions, and dispose of the costs of the suit and of this appeal. And in awarding costs let the court below have regard to the fact that the defendant Náráyaṇ Bábáji has totally failed to establish any defence in this suit."

CROWN CASES

DECIDED IN THE

ORIGINAL AND APPELLATE JURISDICTIONS

OF THE

HIGH COURT OF BOMBAY.

REG. v. WELLS.

Jurisdiction—British-born Subject—Justice of the Peace—Mischief—Ind. Pen. Code, Sec. 426.

1870. March 24.

Where a Magistrate, being also a Justice of the Peace, convicted a British-born subject of mischief under Sec. 426 of the Indian Penal Code, the High Court annulled the conviction and sentence, and directed the accused to be committed to take his trial before the High Court, unless the complainant withdrew the charge, under Sec. 271 of the Criminal Procedure Code.

THE accused, T. L. Wells, a British-born subject, was convicted by G. F. M. Grant, a Justice of the Peace, and Magistrate F. P. in the Ahmedábád district, of mischief, and sentenced, under Sec. 426 of the Indian Penal Code, to pay a fine of Rs. 15, or in default of payment to undergo thirty days' simple imprisonment.

The accused was charged by the complainant with having shot her goat.

The following is an extract from the finding recorded by the Magistrate:—

"The accused has admitted all the essential facts alleged by the complainant. The only fact which he disputes is the value of the goat. *Primâ facie*, the act falls within the definition of mischief, and it is certain that the law does not authorise resort to such violent remedies against trespass."

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Upon a review of the Magistrate's monthly criminal return, A. A. Borradaile, Magistrate of the district of Ahmedábád, referred the case for the orders of the High Court, under Sec. 434 of the Code of Criminal Procedure, with the remark that a Justice of the Peace had no jurisdiction to try a European British subject under the Penal Code, and that the sentence appeared, therefore, illegal.

The case was considered this day by WARDEN and LLOYD, JJ.

PER CURIAM :—The Court annuls the conviction and sentence. The accused must be committed to take his trial before the High Court, unless the complainant withdraw the charge, under Sec. 271 of the Criminal Procedure Code.

Conviction and sentence annulled.

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April 27.

Act VII. (Bombay) of 1867, *Secs.* 27, 28, *and* 29—*Written Order*—*Power of the Police to keep order* in *Temples.*

An order issued under Sec. 28 of the Bombay District Police Act (VII. of 1867) need not be in writing—disobedience of a verbal order given under that section is punishable, under Sec. 29.

The words of Sec. 28 of the District Police Act, which authorise the Police "to keep order *in the neighbourhood* of places of worship during the time of public worship," confer upon the police a power of regulating traffic, and putting a stop to noises, in the neighbourhood of places of worship during the time of worship, but do not limit their general powers of keeping order *at and within* all places of public resort, temples, *jatrás*, or the like, when necessary.

THIS was an application to the High Court, in the exercise of its extraordinary criminal jurisdiction, to set aside an order of G. W. Elliot, Magistrate of Kheḍá, confirming the sentence passed against the accused by the Subordinate Magistrate, First Class, at Thásrá.

The application was heard by GIBBS and LLOYD, JJ.

Nánábhái Haridás for the appellant.

Dhirajlál Mathurádás (Government Prosecutor), for the Crown.

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The facts appear from the following judgment:—

GIBBS, J.:—In this case the accused is charged with opposing and disobeying an order lawfully issued under Sec. 28 of Act VII. of 1869 (Bombay District Police Act), and having been convicted by the First Class Subordinate Magistrate at Thásrá, was fined three rupees, or seven days' simple imprisonment.

On appeal to the District Magistrate of Kheḍá, the conviction and sentence were confirmed. On an application made to this court the record and proceedings were called for, in order to determine whether the conviction was legal or not.

The circumstances of the case are as follow:—

The accused is a priest of the temple of Dákor in the Kheḍá district, at which temple on certain festivals very large numbers of people congregate; and the police authorities, in order to prevent accidents from too great crowding, placed constables at different parts of the building to regulate the ingress and egress of the worshippers. It appears that the complainant in this case was placed at a doorway leading into the *shaiyá mandir*, or bedroom of the god, with orders to prevent persons from going in by that entrance, which was only to be used as a means of egress. The accused came up and endeavoured to enter, when the constable stopped him and told him that he must not enter by that door, but must go round to another entrance, whereupon the accused disobeyed the order, pushed past the constable, and entered by the forbidden door. Under these circumstances he has been convicted and sentenced.

It has been argued before us that, under the 28th section of the District Police Act, the police had no power to act in any way within the precincts of the temple, as the words of that section are "in the neighbourhood of places of worship during the time of public worship." It has been further argued that the words of the 29th section, "orders issued under the last two preceding sections," viz., 27 and 28,

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must be in writing; and on these grounds the conviction is illegal.

I will deal with the second objection first. The words of the 27th and 28th sections are as follow:—

Order for the regulation of public processions, &c.

"XXVII. The District Superintendent of Police may, as occasion requires, direct the conduct of all assemblies and processions on the public roads, or in the public streets or thoroughfares, and prescribe the routes by which, and the times at which, such processions may pass. They may also regulate the use of music in the streets of towns on occasions of festivals and ceremonies.

Police to keep order on public roads, &c.

"XXVIII. It shall be the duty of the police to keep order on the public roads, and in public streets, thoroughfares, bathing, washing, and landing places, and at all other places of public resort, or in the neighbourhood of places of worship during the time of public worship, to prevent obstructions on public roads and in public streets, thoroughfares, bathing, washing, and landing places, and to prevent overcrowding in public ferry-boats."

Now it is to be observed that there is nothing in the Act or in the wording of these sections which requires that these orders should be in writing, and we must interpret them in accordance with common sense; and I think that, as regards the orders mentioned in Sec. 27, it might perhaps be fairly argued that directions "for the conduct of assemblies and processions on the public roads," and "the times at which, and the routes by which," such processions should pass, should be in writing, as also any general regulations which may be made for the use of country music in towns; but when we come to the 28th section it would simply be absurd to suppose that a policeman on duty in a public thoroughfare, or at a place of public resort, should not be able to give a verbal order to people to "move on" or to abstain from some nuisance they might be about to commit. If a written order in every such case was necessary

the police would be powerless, and the Police Act a nonentity. I have, therefore, no hesitation in holding that it is not necessary to have a written order under Sec. 28, but that the disobedience of a verbal order by a policeman is an offence within the meaning of the Act. The order in this case was given under instructions from his superior officer (Sec. 21).

As regards the first objection, the argument of the accused's pleader goes too far, and in reality answers itself. It amounts to this, that because the police are expressly authorised "to keep order *in the neighbourhood* of places of worship during the time of public worship," they cannot in any other way keep order, much less can they keep order *within* the precincts of the temple, or regulate the throng of worshippers moving from one part of the temple to another; but the whole section must be taken together, and then I think it will appear clear that the police have full power to keep order in "all places of public resort," under which category a temple and its enclosure must be included; and that the words above quoted simply confer upon the police a power which they would not otherwise have had of regulating the traffic, or putting a stop to other noises, in the neighbourhood of places of worship during the time of worship, so that the worshippers may not be disturbed in their devotions. Their general powers are in no way interfered with: they may keep order at all places of public resort—temples, *jatrás*, or the like—when necessary, and they also may prevent others from disturbing the worshippers, by noise or otherwise, while their devotions are proceeding.

With every desire to prevent interference with the religious prejudices of the people, this court must uphold all fair and legitimate means adopted by the executive to prevent injury to persons, especially women and children, when flocking in large numbers at *melás* or *jatrás* to some favourite shrine. This principle was fully carried out in the case of *Reg.* v. *Rámchandra Eknáth* (*a*), and it is now high time that the custodians of such shrines should learn that in protecting the helpless and preserving order on such occasions there is

(*a*) 6 Bom. H. C. Rep., Cr. Ca. 36.

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no interference in any way with the orthodox worship of their deities.

From the reports sent up with reference to this case, it would appear that the custodians of this temple have steadily set their face against any such necessary rules and regulations. The duty of the police in such a case is doubtless a very difficult one to carry out, but so long as those duties are performed in a proper manner—and there is nothing to the contrary shown in this case—they have a right to look for the support of their superiors.

I consider no ground has been shown for interference with the conviction in this case. I would, therefore, reject this application.

LLOYD, J., concurred.

Petition rejected.

REG. v. EDWARD REAY.

May 21.

Bombay Legislative Council—Criminal Legislation in India—British-born Subject in the Mofussil—Police Act—Act VII. of 1867 (*Bombay*).

Although the old East India Company had power, under the Charters of Charles II., to make laws affecting British-born subjects, yet this power ceased in A.D. 1709, when its Charters were surrendered to Queen Anne. From that date down to the passing of the 3rd & 4th Wm. IV., c. 123 (with the exception of a limited power of legislating as regarded the local limits of the Presidency Town), no authority expressly granting power to the East India Company or the Indian Government to legislate for British-born subjects can be found.

Semble that neither the East India Company nor any Indian Government (with the like exception) possessed such power from the year 1709 till the passing of the 3rd & 4th Wm. IV., c. 123.

With the exception of offences made punishable, by the 53rd Geo. III., c. 155, s. 105, by Justices of the Peace, the Recorder's Court had, by virtue of the 37th Geo. III., c. 142, s. 10, *exclusive* criminal jurisdiction over British-born subjects throughout the Bombay Presidency; and the same *exclusive* jurisdiction was continued to the late Supreme Court, and is now exercised by the High Court, with the like exception, and some further exceptions introduced by subsequent Acts of the Government of India.

The Bombay District Police Act (No. VII. of 1867), passed by the Governor of Bombay in Council for making Laws and Regulations, is *ultra vires* in so far as it confers criminal jurisdiction upon Magistrates in the Mofussil, being also Justices of the Peace, over British-born subjects, as

it thereby affects the Acts of Parliament under which the High Court is constituted, and interferes with the criminal jurisdiction which that court possesses over British-born subjects in the Mofussil, which jurisdiction is exclusive except in so far as it is limited by Stat. 53 Geo. III., c. 155, s. 105, and certain subsequent Acts of the Government of India.

LIEUTENANT REAY, a European-born British subject, was convicted by G. H. Johns, Magistrate F. P. at Ahmedábád, under Sec. 31 of the Bombay District Police Act, of driving in that city at night without sufficient lights, and was fined one rupee.

A. A. Borradaile, District Magistrate at Ahmedábád, entertaining doubts as to the legality of the conviction, referred the case for the orders of the High Court.

The case was argued on the 19th of January 1870, before GIBBS and SARGENT, JJ.

The Honorable *A. R. Scoble* (Acting Advocate General), with him *Green* and *Dhirajlál Mathurádás*) appeared to support the conviction.

No one appeared on the other side.

Cur. adv. vult.

On the 21st of May 1870 the following judgments, from which the facts of the case sufficiently appear, were delivered:—

GIBBS, J.:—In this case the Advocate General appears to support a conviction by the Full Power Magistrate of Ahmedábád, under the Bombay District Police Act (Bombay Act VII. of 1867), Sec. 31, of a European-born British subject for driving in the town without lamps—fined one rupee.

The District Magistrate had referred this case, under Sec. 434 of the Code of Criminal Procedure, for the orders of the High Court, on the ground that he had doubts whether British-born subjects could be convicted and punished under the Act above quoted.

The Bombay District Police Act was passed by the Legislative Council of Bombay. This Council was created under 24 & 25 Vict., c. 67; and by Sec. 42 it has power to make laws for "the peace and good government of the Presidency,"

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and for that purpose "to repeal and amend any laws and regulations made prior to the coming into operation of this Act by any authority in India, so far as they affect such Presidency: provided always that such Governor in Council shall not have the power of making any laws or regulations which shall in any way *affect* any Act of Parliament in force, or hereafter to be in force in such Presidency." By Sec. 43, unless the sanction of the Governor General be given, it cannot pass any Act affecting the Indian Penal Code.

As the real question in this case is the competency of the Bombay Legislative Council to pass an Act which affects British-born subjects, it becomes necessary to see whether there is any Act of Parliament under which exclusive jurisdiction over British-born subjects is given to the High Court, as, if there be, the Bombay Legislative Council could not alter that jurisdiction.

The Advocate General stated that he could find none, and that the sole mention of the subject is in the 53rd Geo. III., c. 155, s. 105, passed in 1813, but that this, being only a recital, has not the force of law; and the case of *The Queen* v. *The Inhabitants of Haughton* (*a*) was quoted as an authority for this. In that case Lord Campbell, in giving judgment, observed, "A mere recital in an Act of Parliament, either of fact or law, is not conclusive, and we are at liberty to consider the fact or the law to be different from the statement in the recital."

The Advocate General further argued that by Sec. 35 of the abovequoted Act, which has never been repealed, power was impliedly given to the Government to make rules for peace and good order, and that Bombay Act VII. of 1867 does nothing more than this.

It will, I think, be advisable to review the Charters, Regulations, and Acts of Parliament, in order to see what power was given to the East India Company or their Governments in India to make laws for British-born subjects; and also what courts were established, and with what jurisdictions.

(*a*) 1 E. & B. 501.

And first as to the Charters relating to the East India Company.

By the Charter of Charles II. in 1661 (the 3rd of April) power was granted to the East India Company to appoint a Governor and Councillors over each factory; and to the "said Governor and his Council" power was given to "judge all persons belonging to the said Governor and Company, or that shall live under them, in all causes, whether civil or criminal, according to the laws of this kingdom, and to execute judgment accordingly."

By Charter of the same monarch dated the 27th of March 1668, by which the island of Bombay was granted to the East India Company, power was given "to make laws for the good government of the said island," and "also to impose, limit, and provide such pains, punishment, and penalties by fines, amerciaments, imprisonments of body, and, where the quality of the offence shall require, by taking away life or member, as to the said Governor and Company .....shall seem necessary." The same Charter further confers on the Governor and Officers of the island powers to exercise judicial authority in the courts which the Governor and Company (*i.e.*, the East India Company) may establish, and "to correct, punish, govern, and rule all and every the subjects of Us, Our heirs and successors," according to the laws made by the Governor and Company.

Under the Charter granted by King William III., on the 5th of September 1698, to the English Company trading into the East Indies (*i.e.*, the New Company), no such powers appear to have been granted. All the Charters granted to the Old Company were, however, surrendered in 1709 to Queen Anne (*vide* Letters Patent of 7th May 1709), and we must, therefore, pass on to those that followed, and first to the Letters Patent of George I., dated 24th September 1726. By these the Mayor's Court was established in Bombay for the trial of civil matters, and the Governor in Council constituted the sole Court of Oyer and Terminer for the trial of all criminal offences except high treason, which could apparently be only tried in England. The second Charter of the

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Mayor's Court in 1753 by George II. left matters, so far as the criminal jurisdiction is concerned, in the same state. I may here remark that no change in the courts occurred until 1796, when the Stat. 37 Geo. III., c. 142, was passed, establishing the Recorder's Court at Bombay, the Letters Patent of which are dated the 20th of February 1798; under these the court was made the criminal court for the trial of all offences, treason not excepted. This was subsequently superseded in 1823 by the Supreme Court, which was created under the powers of the 4th Geo. IV., c. 71, under Letters Patent dated 8th December 1823. On this court were conferred all the powers of a Court of Oyer and Terminer; and it was finally superseded by the present High Court, created under 24 & 25 Vict., c. 104, by Letters Patent dated 26th June 1862 and 28th December 1865.

The Charter of George I. (1726) also provides for making by-laws and ordinances as follows :—

"And whereas it may be necessary that certain by-laws and ordinances should hereafter be made for the better government and regulation of the several corporations hereby erected, and it is reasonable that the power of making such by-laws and ordinances should be subject to the direction and control of the said United Company of Merchants of England trading to the East Indies, we do hereby," &c. "give and grant to the said United Company," &c. "that it shall and may be lawful to and for the Governors or Presidents and Councils of the several towns and factories of Madraspatnam, Bombay, and Fort William in Bengal, for the time being," &c. "from time to time to make, constitute, and ordain by-laws, rules, and ordinances for the good government and regulation of the several corporations hereby erected, and of the inhabitants of the several towns, places, and factories aforesaid respectively, and to impose reasonable pains and penalties upon all persons offending against the same or any of them."

In the Charter of George II. the power to make by-laws and ordinances differs from that given by George I.

The paragraph runs thus :—

"And whereas it may be necessary that certain by-laws and ordinances should hereafter be made for the better government and regulation of the several corporations and courts hereby erected, and it is reasonable that the power of making such by-laws and ordinances should be subject to the direction and control of the said United Company of Merchants of England trading to the East Indies, We do hereby" &c. "give and grant unto the said United Company, and their successors," &c. "that it shall and may be lawful to and for the respective Governors or Presidents and Councils of the several towns and factories of Madraspatnam, Bombay, and Fort William in Bengal, for the time being respectively," &c. "and also for the Court of Directors of the said United Company," &c. "to make, constitute, and ordain by-laws, rules, and ordinances for the good government and regulation of the several corporations and courts hereby erected, and of the inhabitants of the several towns, places, and factories aforesaid" (*i.e.*, as to Bombay, "the town and factory of Bombay, and other the factories subordinate thereto"), "and to impose reasonable pains and penalties upon all persons offending against the same, or any of them."

Thus far the Charters.

The earliest Regulation relating to courts in the Bombay Presidency is Reg. V. of 1799, passed by the Governor in Council of Bombay, establishing a court in Salsette for the trial of criminal offences, and a similar one (Reg. I. of 1800) for Súrat, in both of which the courts so established are expressly declared not to have jurisdiction over British-born subjects, who are to be sent to Bombay for trial, where the Recorder's Court was then in existence; and similar provisions have been continued by subsequent enactments of the Bombay Government up to and including the Elphinstone Code in 1827.

I will now refer to the various Acts of Parliament bearing on these subjects.

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The first Act in which any reference to British-born subjects is found is the 13th of Geo. III., c. 63, s. 14 (1773), which conferred on the Supreme Court of Judicature at Calcutta, established under that Act, full power and authority "to hear and determine all complaints for any crimes, misdemeanours, or oppressions made against any of His Majesty's subjects, and such jurisdiction shall and may extend to all British subjects who shall reside in the kingdoms or provinces of Bengal, Behar, and Orissa under the protection of the said United Company."

By the 36th section of the same Act the Governor General in Council is authorised "to make and issue such rules, ordinances, and regulations for the good order and civil government of the said United Company's settlement at Fort William aforesaid, and other factories and places subordinate or to be subordinate thereto, as shall be deemed just and reasonable.....and impose, inflict, and levy reasonable fines and forfeitures for the breach or non-observance of such rules, ordinances, and regulations." These rules, however, were not to be valid or of any force until duly registered and published in the Supreme Court with its consent and approbation.

Owing to very considerable differences which arose between the Judges of the Supreme Court and the Governor General, the above Act was modified by 21 Geo. III., c. 70, (1778), in which, after reciting the previous Act, and the fact that misunderstanding had arisen, it is enacted that the Governor General in Council in his public capacity is not subject to the Supreme Court, that parties impleaded in that court for acts done by order of the Governor General in Council may plead the general issue, and give such order in evidence, &c., "and be fully justified, acquitted, and discharged from all and every suit, action, and process whatsoever, civil or criminal, in the said court."

Then follows an important proviso, viz., that with respect to orders of the Governor General in Council which do or shall extend to any British subject or subjects the said

Court shall have and retain as full and competent jurisdiction as if this Act had never been made.

By the 23rd section of the Act the Governor General in Council may frame regulations for provincial courts. The section runs thus :—

"And it is hereby enacted that the Governor General and Council shall have power and authority from time to time to frame regulations for the provincial Courts and Councils, and shall, within six months after the making the said regulations, transmit, or cause to be transmitted, copies of all the said regulations to the Court of Directors, and to one of His Majesty's Principal Secretaries of State, which regulations His Majesty in Council may disallow or amend; and the said regulations, if not disallowed within two years, shall be of force and authority to direct the said provincial Courts, according to the tenor of the said amendment, provided the same do not produce any new expense to the suitors in the said Court."

The next Act to be referred to is the 26th Geo. III., c. 57 (1786), in the 29th section of which it is thus enacted :—

"That as well the servants of the said United Company as all other of His Majesty's subjects resident or to be resident in India shall be, and are hereby declared to be, amenable to the Courts of Oyer and Terminer and Gaol Delivery, and Courts of General or Quarter Sessions of the Peace, in any of the British settlements in India, for all murders, felonies, homicides," &c..... "whatsoever by them done, committed, or perpetrated.....in any of the countries or parts of Asia, Africa, or America beyond the Cape of Good Hope to the Straits of Magellan within the limits of the exclusive trade of the said United Company;" and in the following section the jurisdiction of the Governor or President and Council of Fort St. George (Madras) in the Court of Oyer and Terminer and Gaol Delivery is extended over all British subjects whatsoever who reside in certain territories and dominions which were not included in the Charter of 1753, which comprised only "the said town

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of Madraspatnam, and in and for Fort St. George, Fort St. David, Vizatnapatnam, the factories on the coast of Sumatra, and all other factories subordinate to Fort St. George aforesaid."

The next in order, viz., 37 Geo. III., c. 142, s. 10, which defines the jurisdiction of the Recorders' Courts, is of great moment in the decision of this case. It runs in the following words:—

"Provided nevertheless, and be it further enacted, that the said new Charter, which His Majesty is hereby empowered to grant, and the jurisdiction, powers, and authorities to be thereby established, shall extend to all British subjects who shall reside within any of the factories subject to, or dependent upon, the Governments of Madras and Bombay respectively; and the said Charter shall be competent and effectual, and the said courts therein and thereby established shall have full power and authority, according to their respective jurisdictions, to hear and determine all, and all manner of, complaints against any of His Majesty's subjects for any crimes, misdemeanours, and oppressions committed or to be committed."

By the 40th Geo. III., c. 79 (1800), the Madras Supreme Court was founded with similar jurisdiction over the Madras Presidency as the Supreme Court at Fort William had over the Presidency of Bengal. In this Act, by Sec. 11, power is given to the Governor in Council of Madras to frame regulations for the Provincial Courts and Councils within the Presidency of Madras, in the same manner as the Governor General in Council at Fort William has power under the 21st Geo. III., c. 70.

By the 47th Geo. III., c. 68 (1807), the Governments of Madras and Bombay were empowered to make rules and regulations for the good order and civil government of the towns of Madras and Bombay, and of the Company's settlements at Fort St. George and Bombay, and over factories and places subordinate thereto, and to impose, inflict, and levy reasonable fines, &c., for the non-observance of such

rules, ordinances, and regulations, in the same manner as the Governor General in Council at Fort William could, under the provisions of 13 Geo. III., c. 63, s. 36. But the said rules &c. were to be first registered in the Supreme Court at Madras and the Recorder's Court at Bombay respectively.

And by the 3rd section of this Act the Governor in Council of Bombay is authorised to make rules and regulations for the provincial Courts and Councils subject to that Presidency, in like manner as the Governor General in Council at Fort William, under 21 Geo. III., c. 70, does for that of Bengal.

The next Act to be referred to is the 53rd Geo. III., c. 155, s. 105, on the recital of which the Advocate General's argument has already been stated; it runs thus :—

"And whereas His Majesty's British subjects resident in the British territories in India without the towns of Calcutta, Madras, and the town and island of Bombay, are now by law subject only to the jurisdiction of His Majesty's courts at Calcutta, Madras, and Bombay respectively, and are exempted from the jurisdiction of the courts established by the said United Company within the said territories, to which all other persons, whether natives or others, inhabitants in the said territories without the limits of the towns aforesaid, are amenable; and whereas it is expedient to provide more effectual redress for the native inhabitants of the said territories, as well in the case of assault, forcible entry, or other injury accompanied with force, which may be committed by British subjects at a distance from the places where His Majesty's courts are established, as in case of Civil controversies with such British subjects: be it, therefore, enacted that it shall and may be lawful for any native of India resident in the East Indies, or parts aforesaid, and without the said towns, in case of any assault, forcible entry, or other injury accompanied with force, alleged to have been done against his person or property by a British subject, to complain of such assault, forcible entry, or other injury accompanied with force, not being felony, to the Magistrate

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of the Zilla or District where the alleged offender shall be resident, or in which such offence shall have been committed; and that such Magistrate shall have power and authority, at the instance of the person so complaining, to take cognisance of such complaint, to hear parties, to examine witnesses, and, having taken in writing the substance of the complaint defence, and evidence, to acquit or convict the person accused; and, in case of conviction, to inflict upon such person a suitable punishment by fine not exceeding five hundred rupees, to be levied, in case of non-payment, by warrant under the hand of the said Magistrate, and upon any property of the party so convicted which may be found within the said district."

I have now noted the only charters, enactments by Parliament, or regulations which need be alluded to in arriving at a decision on the point before the court. (I have also set out the extracts at length, as many of the Charters are now difficult to procure. The Advocate General stated he was unable to obtain a copy of the Mayor's Court Charter: the copy from which I have quoted is, I believe, the only one in Bombay, and I am not aware of other copies of the Charters of Charles II. but those from which I have made these extracts.)

From a careful consideration of these, it seems to me that although the East India Company had power to make laws regarding British-born subjects under the Charters of Charles II., yet that this power ceased, at all events after the surrender of the Charters to Queen Anne, and that from that date up to the passing of the 3rd and 4th Wm. IV., c. 123, under which legislative powers "over all persons and all courts, whether established by royal charter or otherwise," were conferred exclusively on the Governor General in Council, no authority expressly granting powers to the East India Company or the Indian Government to legislate for British-born subjects can be found. It is also a fact, so far as I have been able to ascertain, that no local law or regulation was ever passed affecting British-born subjects (at all events beyond the island of Bombay or the Presidency Towns of Calcutta and Madras respectively) by any Indian Govern-

ment until 1834, when the powers of the local Governments to legislate ceased, and the Governor General's Council became the sole legislative power in India.

The powers to make "rules, ordinances, and regulations" for the good order of the settlements or Presidency Towns of Fort William, Madras, and Bombay were, as above shown, conferred on the Government of the first in 1773, and on those of the other two in 1807; and the power to make regulations for provincial Courts and Councils was granted to the Governor General in Council in 1781, to the Governor in Council of Madras in 1800, and to that of Bombay in 1807; and the former of these powers were dependent on the consent by registration of the Supreme or other King's Courts.

As has been above shown, the Charters of George I. and II. conferred some powers of legislation on the three governments; and when the Act was passed which repealed such portion of the Charters as applied to the courts constituted by them there was a silence as to any express repeal of the powers to make laws. Of course, the "corporations and courts" created by the Charters being abolished, the power to make laws and regulations for them ceased; but it is a question whether the portion of the Charters which gave Government power to make such "for the good government of the inhabitants of the several towns, places, and factories aforesaid," was repealed until 3 & 4 Wm. IV., c. 123.

I have been especially led to consider this subject as I could find no authority for the Regulation of 1799 save this unrepealed portion of the Charter of George II. The power to make regulations for provincial courts and councils was granted to the Governor General in 1781, as above noted; and the earliest Bengal Regulation I can find regulating the jurisdiction of courts is in 1793, when a formal system for codifying "all Regulations that may be enacted," was settled by Reg. XLI. of 1793 (although revenue regulations of 1783 are quoted in Reg. I. of 1795). The powers to Madras were granted in 1800, and the first Madras Regulation on the subject that I can find was passed in 1802; while,

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although similar powers were not granted to the Bombay Government by the Imperial Legislature until 1807, yet we find Regulations were passed by it in 1799 to 1806 inclusive, the first of which is little more than a copy of the Bengal Reg. XVI. of 1793.

I have, however, by dint of searching among the old Regulations long since repealed, discovered what the state of things really was, and it confirms the view I was inclined to take, that unless the Charter of George II. gave power none existed. The preamble of Reg. II. of 1808, the first apparently passed after the receipt of the Act 47 of Geo. III., c. 68 (1807), giving power to pass Regulations for local courts, shows that the Regulations previous to that date had been passed on a right "inferred from and briefly recognised by the eleventh section of the Act of Geo. III., c. 142, passed on the 20th of July 1797" (*i.e.*, 37 Geo. III.), "but is, for the purpose of removing all doubts, more formally conferred by the 2nd section of the 47th of Geo. III., c. 68," which is then set out.

The portion of the section in 37 Geo. III. alluded to is as follows:—After setting out the jurisdiction of the Recorder's Court then founded, and stating that it shall entertain no suit against the Governor and Council for acts done in its public capacity, it goes on, "nor shall the said court have or exercise any jurisdiction in any matter concerning the revenue under the management of the said Governor and Council, either within or beyond the limits of the said towns, forts, or factories, or concerning any act done according to the usage and practice of the country, and the regulations of the Governor and Council," which is certainly a very faint recognition of legislative powers, and, if so at all, must, I think, as the section must be taken as a whole, be confined solely to revenue matters.

I think, therefore, that the total absence of any express power to legislate for British-born subjects from and after Queen Anne's reign, with the exception of the limited power as regarded the local limits of the Presidency towns, and which was in a way regulated by the King's Courts, which

could refuse to register the Regulations, is in itself a very strong ground for holding that the Government of Bombay had no such power. It is true that there is no express law forbidding it; but, as the power which was once clearly given was as clearly repealed and never re-granted, I do not see how it can be argued that the power remained.

As regards the jurisdiction of the courts, it will not be necessary for me to go beyond the first Charter granted after the surrender of the old ones to Queen Anne, viz., the Charter of George I. establishing the Mayor's Court at Bombay, which granted to the Governor in Council exclusively the powers of Oyer and Terminer over all persons, including British-born subjects, save in cases of high treason. Similar powers were confirmed to that authority by the Charter of 1753; but by the Stat. 37 of Geo. III., c. 142, s. 18, passed in 1797, these powers were expressly revoked in the following words :—

"And be it further enacted that so much of the Charter granted by his late Majesty as confers any.....criminal .....jurisdiction upon.....the President and Council as a Court of.....Oyer and Terminer and Gaol Delivery .....in case a new Charter shall be granted by His Majesty .....from and immediately after such publication at..... Bombay.....shall cease and determine, and be absolutely void to all intents and purposes." And the jurisdiction previously granted to the Governor in Council was, by Sec. 10 of the same Act above quoted, conferred on the Recorder's Court established by Letters Patent in February 1798, *i.e.*, criminal jurisdiction "over all British subjects who shall reside within any of the factories subject to or dependent on the Government of Bombay, and to hear and determine all manner of complaints against any of His Majesty's subjects."

Now it has been argued that this only gave a concurrent jurisdiction, and not an exclusive one, over British-born subjects; but if at this time, as I find to be the case, the Government had been deprived of their own power to try

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British-born subjects for criminal offences, and had no power to pass laws relating to them, I am at a loss to see what jurisdiction could exist with which the jurisdiction of the Recorder's Court can be said to have been concurrent.

At that time, 1798, the possessions of the East India Company in the Bombay Presidency consisted, so far as I can discover, of the island of Bombay, ceded in 1668, together with the islands of Salsette and Karanjá, which were acquired by conquest in 1774, and also the small fort of Victoria and the nine dependent villages in the Southern Konkaṇ, of which we obtained possession in 1756, together with the English factory at Surat; and the first Régulation passed by the Governor in Council of Bombay establishing a court beyond the limits of the island was, as above noted, Reg. V. of 1799, establishing a criminal court for Salsette and Karanjá, from which jurisdiction over British-born subjects is expressly excluded.

It has been argued that this exclusion was at the pleasure of the Bombay Government, who might equally have granted to the court that jurisdiction which they withheld; but I think it must rather be held that at that time they had no power to legislate for British-born subjects, if to legislate at all; and as the Recorder's Court had, by authority of Parliament, been given jurisdiction over all British-born subjects, the exemption of such from their newly-established court by the Bombay Government was not optional, but obligatory.

That it was generally understood that British-born subjects could only be tried by the King's Courts no one, I apprehend, will deny; and all the subsequent enactments by the Bombay Government until 1834 bear out this view.

If I am correct in the opinion I have deduced from the facts before me, I can only arrive at the conclusion that the statement made in the 53rd Geo. III., c. 155, s. 105, is completely borne out, and that at that period (1813) His Majesty's British subjects were by law, viz., the 37th of Geo. III., c. 142, s. 10, only subject to the jurisdiction of His Majesty's courts at that place, and that in consequence,

as no repeal of that law has been made, the Bombay District Police Act, in giving magistrates jurisdiction over British-born subjects, for offences, which they had not previously, *affects* an Act of Parliament, viz., 37 Geo. III., c. 142, s. 10.

Further, as no alteration has ever been made in the jurisdiction of the courts established by royal charters since the establishment of the Recorder's Court, excepting in so far as the 53rd of Geo. III., c. 155, s. 105, above quoted, enables magistrates in the Mofussil to deal with some minor cases, and a further power conferred by the Criminal Code of Procedure, which does not include a charge like the present, it follows that a like jurisdiction is still exercised by the High Court at this Presidency, and under the same authority, viz., that of Parliament.

Such being the case, it seems to me that the Bombay Legislative Council cannot remove from the jurisdiction of the High Court the trial of any offence over which the jurisdiction of the High Court extends; if, therefore, the offence created by the Bombay District Police Act be an offence over which the High Court has jurisdiction, the Act, so far as it relates thereto, is on this ground also "*ultra vires*," and the conviction and sentence must be set aside.

But this raises another question, viz., whether the offence is one which must be tried by a Court of Oyer and Terminer, or whether it be of such a nature as would be generally cognisable by a Justice of the Peace.

The offence of which Lieutenant Reay has been convicted was an offence against a local law, viz., the Bombay District Police Act, which extends to the Mofussil only, and consisted of driving a vehicle on a dark night without sufficient lights (Sec. XXXI., cl. 3), punishable by fine not exceeding fifty rupees; and, under Sec. 40, in the event of an offender being, as in the present case, a European British-born subject, it is enacted that the Magistrate shall, as a "Justice of the Peace, proceed for the recovery of the penalty as laid down in Stat. 53 Geo. III., c. 155, s. 105, in cases of assault." The Magistrate in this case was a Justice of the Peace.

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Now, under this lastmentioned enactment (above set out) the Magistrate has power to deal with cases of assault, forcible entry, or other injury accompanied with force not being a felony, alleged to have been committed by a British subject against a native (subsequently, by Act VII. of 1853, extended to any person, native or other); and certainly by comparison the offence against the police law of driving at night without a light is a much less heinous offence than those over which the Magistrate, being a Justice of the Peace, has jurisdiction; and it must also be admitted that, following English precedents, it would be absurd to commit a person charged with such a petty offence to the High Court for trial.

It might also perhaps be suggested that the offence charged against Lieutenant Reay could not be tried in the High Court; but it is singular that no other forum existed, until the 53rd Geo. III., c. 155, before which a British-born subject could be tried for any offence.

In England an offence created which is confined to Magistrates to punish cannot be brought before a grand jury for presentment to a Court of Oyer and Terminer (see Russell on Crimes, Vol. I., p. 88); but here it would appear that certainly until 1720, when Governors and other high officials were created Justices of the Peace, there was only *one* court for the trial of British-born subjects for *all* offences: and as the powers to be exercised by Justices of the Peace were clearly laid down, and were confined apparently to making rules for scavenging the Presidency town and raising rates for that purpose, I doubt if the distinction between indictable and other offences was ever thought of.

The power of a Justice of the Peace in India has never been placed on a clear footing, and many able officers have been of opinion that there is nothing to prevent a Justice of the Peace in the Mofussil from sitting in petty sessions, or from disposing of the same class of petty offences that they would in England.

Under the Code of Criminal Procedure, as above observed, Secs. 163 and 165, the jurisdiction of Justices of the Peace in

the Mofussil has been considerably extended, and includes all offences contained in Chap. X. of the Indian Penal Code, one of which (Sec. 188) is "disobedience to an order lawfully promulgated by a public servant," "if such disobedience causes danger to human life, health, or safety." Had, therefore, the prohibition to drive without lights on a dark night been issued by the Magistrate under Sec. 62 of the Code of Criminal Procedure, the conviction in this case might have been good; but because the order disobeyed was enacted by the Bombay Legislative Council, which in so doing affected the provisions of an Act of Parliament, it cannot be brought within Sec. 165 of the Code of Criminal Procedure, and is bad.

The dilemma thus raised seems absurd, and the question involved is one of no small difficulty. I regret it should come up in an *ex-parte* case, in which the court could hear an argument on one side only.

Justices of the Peace in India were at first Governors and certain high officials; and it was not until the Act of 33rd Geo. III., c. 52, that power was given to the Governor General to appoint other persons to be Justices. A. D. 1720 is the earliest date on which Governors were made Justices, and it may be that the powers which were inherent in Justices of the Peace at that date may be exercised by them now.

But there is no doubt that as to any further powers they are such only as have been conferred by Act of Parliament or other competent authority (as the Governor General's Council since 1834); and I am not aware of power to Justices in the Mofussil of Bombay, to punish such an offence as Lieutenant Reay is charged with, having been conferred save by the Bombay District Police Act, now under our consideration. The question, therefore, as to whether a Justice of the Peace *quâ* Justice of the Peace could deal with this offence really turns on the same question as is above discussed, viz., the powers of the Bombay Council to pass the Act in question; and, as I have above stated my opinion on that point to be adverse to the Act, this subsequent question,

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which I have deemed it right to notice, is disposed of in a similar manner.

Under all the circumstances, then, I am of opinion that the conviction and sentence on Lieutenant Reay must be annulled, as having been passed without jurisdiction, and the fine must be repaid to him.

SARGENT, J.:—The question in this case which the Court has to decide, although doubtless an important one, lies, in my opinion, in a very small compass.

The Act under which the accused was convicted was passed by the Legislative Council of Bombay, which owes its existence to the 24th & 25th Vict., c. 67. By Sec. 42 of that Act the Governor in Council has power to make laws for the peace and good government of the Presidency, and for that purpose to repeal and amend any Laws and Regulations made prior to the coming into operation of this Act, by any authority in India, so far as they affect such Presidency: provided always that such Governor in Council shall not have the power of making any laws or regulations which shall in any way affect any Act of Parliament in force, or hereafter to be in force, in such Presidency.

By Act 37 of George III., c. 142, the powers of Oyer and Terminer over all persons, including British-born subjects, which by the Charter of George II. had been given to the Governor in Council, were revoked, and the same were conferred on the Recorder's Court, which His Majesty was thereby authorised to establish at Bombay; and authority was given to the said court to hear and determine all, and all manner of, complaints against any of His Majesty's subjects for any crimes, misdemeanours, and oppressions committed in territories subject to, or dependent on, the Government of Bombay, or which might thereafter be subject to, or dependent on, the said Government. Letters Patent were issued in February 1798 establishing the Recorder's Court.

The criminal jurisdiction over British-born subjects (at least so far as the Mofussil is concerned) would appear to have remained unaltered till 1813, when, by Act 53rd Geo. III., c. 155, Magistrates in the provinces were authorised to

act as Justices of the Peace, and to have jurisdiction in cases of assault, forcible entry, or other injury accompanied by force, not being felony, committed by British subjects residing without the limits of Bombay.

By Act 4 of George IV., c. 71, the Recorder's Court was abolished, and it was directed that all the powers and authorities granted by Act 37 of George III., c. 142, to the Recorder's Court should be exercised by the Supreme Court thereby authorised to be erected, and which was duly established by Letters Patent on the 8th of December 1823. Lastly, by Act 24 & 25 Vict., c. 104, the erection of a High Court of Judicature was authorised to be established at Bombay by Letters Patent; and, save as by such Letters Patent might be otherwise directed, it was declared that the said court should have and exercise all jurisdiction, and every power and authority whatsoever, in any manner vested in the Supreme Court, which it was thereby enacted should be thenceforth abolished.

Letters Patent were issued on the 26th of June 1862, creating the High Court, and conferring on it the same original criminal jurisdiction as had been exercised by the Supreme Court. These Letters Patent were revoked by fresh Letters Patent dated 28th December 1865, leaving, however, the original criminal jurisdiction unaltered. It thus appears that in 1867, when the Police Act in question was passed, the High Court had jurisdiction over all offences committed by British-born subjects in the Mofussil except so far as was especially provided for by Act 53 Geo. III., c. 155.

It is further clear, from all the Regulations providing for the criminal jurisdiction and procedure of the courts in the Mofussil, that British-born subjects were especially exempted from their jurisdiction. This appears from the earliest Bombay Regulation, viz., Reg. V. of 1799, and from all the succeeding Regulations on the subject, concluding with Reg. XIII. of 1827, which determined the criminal jurisdiction of those courts up to the time when the present Criminal Procedure Act of 1861 was passed; and by Sec. 24 of that Act all persons are exempted from their jurisdiction who

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were so exempted by any Act of Parliament, or Regulation of the Codes of Bengal, Madras, and Bombay respectively.

Again, although the Governors and Councils at Calcutta, Madras, and Bombay were, subsequently to the establishment of the Supreme Court and Recorder's Court at those places, respectively authorised by Acts 33 Geo. III., c. 52, and 47 Geo. III., c. 68, to appoint Justices of the Peace in the provinces and places subordinate thereto, from the covenanted servants of the East India Company or other British subjects, there is no Act of Parliament except Act 53 Geo. III., c. 155, or Bombay Regulation, or Regulation of the Governor General in Council, authorising Justices of the Peace to hear and determine any offences committed by British-born subjects in the Mofussil.

It thus appears that at the time of the passing of the Police Act in question the High Court had exclusive jurisdiction over all offences committed by British-born subjects in the Mofussil except as provided by Act 53 Geo. III., c. 155.

Now, by Sec. 30 of the Police Act in question, it is enacted that whoever offends by the commission of certain acts therein enumerated (amongst which is included that with which the accused was charged in the present case, viz., of driving a vehicle on a dark night without a sufficient light so as to cause obstruction, annoyance, risk, danger, or damage to residents or passengers, shall, on conviction before a Magistrate, be liable to a fine not exceeding fifty rupees, or in default to imprisonment not exceeding eight days; and by Sec. 40 it is enacted that in case the offender shall be a European British subject the Magistrate shall, if a Justice of the Peace, proceed for the recovery of the penalty as directed by 53 Geo. III., c. 155, s. 105, and, if not a Justice of the Peace, shall record the facts, and transmit such record to any Magistrate of the district being a Justice of the Peace.

Complete jurisdiction is thus given to a Magistrate being a Justice of the Peace over a number of offences committed by European British-born subjects in the Mofussil, concurrently with the High Court, which, as has been already shown, has jurisdiction over all offences committed by the above persons.

The question, therefore, to be determined is, whether in thus creating a concurrent jurisdiction the Bombay Legislative Council have passed an Act in any way affecting the provisions of the Act of the 24th and 25th Vict., c. 104, or of the several Acts of the 4th Geo. IV., c. 71, and 37th Geo. III., c. 142, which by successive reference to the powers of the Supreme and Recorder's Court are virtually incorporated in it, so far as the original criminal jurisdiction of the court is concerned.

It was argued by the Acting Advocate General that no words are to be found in any of the above Acts which confer an exclusive criminal jurisdiction over British-born subjects, and that, therefore, the creation of a concurrent jurisdiction does not affect the provisions of the Acts in question.

Now that the provisions of the Bombay Act do not expressly or by necessary implication repeal or alter the provisions of the Imperial Acts may be readily conceded, but the expression "in any way affect" is one of much larger import than either "repeal" or "alter," and is clearly, I think, used by the Legislature to prevent the creation of a new state of things with respect to the subject-matter common to the Imperial and Bombay Acts, which, although not directly inconsistent with, would yet practically modify, the state of things which had previously existed under the provisions of the Imperial Act. In such a case the provisions of that Act would certainly be "affected" according to the ordinary and commonly received meaning of that term; and it is in that sense, therefore, in the absence of any qualifying words, that the expression must be deemed to have been used by the Legislature.

Now I do not stay to inquire whether, under the several Imperial Acts conferring on the local Governments the power of making laws and regulations, or any of them, British-born subjects could, as was contended by Mr. Scoble, have been made amenable to the criminal jurisdiction of the Company's courts in the Mofussil. Mr. Justice Gibbs has discussed that question at great length, and I would not for a moment be understood as intending to dissent from his conclusion. It

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is, however, immaterial, in my opinion, what might, or might not, have been done under those powers. They no longer exist, and it is sufficient for the decision of the question before the court to say that, as a matter of fact, the High Court had, at the time the Bombay Act was passed, exclusive jurisdiction over all offences committed by British-born subjects in the Mofussil except so far as was provided for by the Imperial Act 53 Geo. III., c. 155.

That being so, the creation of a concurrent jurisdiction practically modified the jurisdiction of the High Court and the *status* of British-born subjects. It is not too much to say that practically the jurisdiction of the court over the offences in question would become a dead letter, and the British-born subject would be deprived of the privilege he had hitherto enjoyed (subject to the provisions of the Imperial Act 53 Geo. III.), of being amenable only to the High Court, and of having the charge against him decided by a jury of his countrymen; and I can, therefore, entertain no doubt that the provisions of the imperial Acts determining the criminal jurisdiction of the High Court are "affected" by the Bombay Act in question.

With respect to the power given by the Charter of George II. to the Governor in Council to make by-laws, rules, and ordinances for the good government and regulation of the several corporations and courts thereby created, and of the inhabitants of the several towns, places, and factories of Madraspatnam, Bombay, or Fort William, for the time being belonging and subordinate thereto, and to impose reasonable pains and penalties upon all persons offending against the same, it may well be doubted whether this power is not taken away by Act 3 & 4 Wm. IV., c. 85; but in any case it would appear to be confined to Europeans engaged in and about the factories, and to be quite inapplicable to the present state of things. I am, therefore, of opinion that the conviction must be annulled, and the fine levied be restored to the accused.

Conviction and Sentence annulled.

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April 20.

REG. v. AMRUTA' NATHU.

Crim. Proc. Code, Sec. 173—*Act XXIII. of* 1861, *Sec.* 16—*Case sent by a Subordinate Judge to a District Magistrate for investigation—Refusal of Magistrate to investigate.*

A Subordinate Judge, finding that a person had made a false verification of a plaint, sent his case for investigation to a Magistrate of the district, who refused to investigate it, on the ground that the alleged offence was one triable exclusively by the Court of Session, to which the Subordinate Judge himself should, under Sec. 173 of the Code of Criminal Procedure, have committed it.

Held that the Magistrate of the District was bound to proceed with the investigation of the case, according to Sec. 16 of Act XXIII. of 1861.

THIS was a reference from the Honorable G. A. Hobart, Session Judge of Khándesh, under Sec. 434 of the Code of Criminal Procedure, submitting the proceedings in this case for the orders of the High Court, in consequence of a report of the Subordinate Judge of Varaṇgáṁ. The Session Judge stated—

"The Subordinate Judge of Varaṇgáṁ reported to this Court, on the 9th of February last, that, under Sec. 16 of Act XXIII. of 1861, he had, being of opinion that one Amrutá Nathu had made a false verification of a plaint in a case before him, sent the case to the District Magistrate for investigation, and that the Magistrate had returned him the case declining to make the investigation, which the Subordinate Judge was of opinion was an illegal proceeding, the ruling of the High Court of Bombay, reported at page 30, Crown Cases, Vol. IV. Bombay High Court Reports, showing it to be so. The record of the proceedings was sent for by this court, as it was of opinion that the District Magistrate's refusal to investigate the case, as reported by the Subordinate Judge, was not regular.

"The record being certified, it appears that the case was sent to the District Magistrate, for the purpose specified in his report to this court, by the Subordinate Judge, with a formal sanction to a prosecution being instituted against

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Amrutá Nathu, for having made before him a false verification of a plaint. This was on the 10th of January last, and on the 20th idem the District Magistrate sent back the papers of the case to the Subordinate Judge, declining to investigate the case, on the ground that such an offence as that which Amrutá Nathu was said to have committed was one punishable under Sec. 199 of the Penal Code, and was triable exclusively by a Court of Session; and that, under Sec. 173 of the Criminal Procedure Code, the Subordinate Judge should have completed the investigation himself, and, if the case required commitment, have himself committed the accused to the Court of Session for trial for the alleged offence.

"The precedent quoted by the Subordinate Judge does not apply to the case so nearly as that of *The Queen* v. *Jan Mahomed* (*a*), which appears to be on all fours with the present case, and the ruling in that reported case shows that the District Magistrate, in his refusal to investigate the case, acted irregularly, and that the Subordinate Magistrate, having once sent the case to the Magistrate, could not himself investigate it, and commit the accused to the Court of Session. This court is of opinion that it would probably have been better (being apparently more convenient) that the Subordinate Judge should have disposed of the case without reference to the Magistrate, as he could have done; but, nevertheless, it was a matter in which he was at liberty to exercise his own discretion."

The reference was considered by WARDEN and LLOYD, JJ.

PER CURIAM:—The Court, agreeing with the Judge of Khándesh, reverses the order of the District Magistrate, and directs him to proceed with the investigation of the case according to law (Sec. 16 of Act XXIII. of 1861).

(*a*) XII. Cal. W. Rep., Cr. R. 41.

1870.
June 8.

REG. v. RAGHA' NA'RANJI *et al.*

Case submitted by Subordinate Magistrate for Sentence — Sentence passed in absence of Accused—Crim. Proc. Code, Sec. 277.

When the proceedings in a case tried by a Subordinate Magistrate are submitted, under Sec. 277 of the Code of Criminal Procedure, to a District Magistrate to pass sentence upon the accused, the accused is entitled to be present at the passing of such sentence before the District Magistrate.

THIS was an application to the High Court for the exercise of its extraordinary criminal jurisdiction.

The prisoners were convicted of the offence of theft in a dwelling-house by the Second Class Subordinate Magistrate at Párdi. The Subordinate Magistrate, being of opinion that a more severe punishment than he was competent to adjudge should be passed upon the prisoners, referred the proceedings, under Sec. 277 of the Code of Criminal Procedure, to T. C. Hope, Magistrate of the Súrat district.

Mr. Hope sentenced prisoner No. 1 to six, No. 2 to four, and No. 3 to three months' rigorous imprisonment.

An appeal was presented to the Session Judge, on the ground, *inter alia*, that the sentences, having been pronounced by the District Magistrate in the absence of the accused, were illegal. The Session Court called upon the District Magistrate to state whether he had passed sentences in the absence of the accused persons, and he stated that he had done so, and forwarded as his authority a Resolution of the High Court dated 19th June 1869, passed on a reference of the District Magistrate of Súrat, to the following effect:—

"The District Magistrate should be informed that the Code of Criminal Procedure does not require the accused person to be present before the Magistrate to whom the case is referred when such Magistrate only passes a sentence or order in the case. But if the Magistrate desires to recall and examine any witness who shall already have given evidence in the case, or to call for or take any further evidence, the presence of the accused person before him is necessary."

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He further drew attention to a Circular order of the High Court, No. 1038 of 1866, dated 11th July 1866 :—

"A question having arisen with respect to the disposal of the accused in a case referred to the Magistrate by a Subordinate Magistrate, under Sec. 277 of the Code of Criminal Procedure, I am directed by the Honorable the Chief Justice and Judges of Her Majesty's High Court of Judicature to inform you that, in every case referred under Sec. 277 of the Code of Criminal Procedure, the accused person should, pending the disposal of the reference, be kept in the custody in which he was at the trial: provided that, when the offence is a bailable one, the Subordinate Magistrate may, if he thinks fit, take fresh bail for his appearance when called upon."

Upon consideration of all these documents, and the merits of the petitioner's appeal, the Session Judge saw no reason to interfere.

The case was argued before GIBBS and LLOYD, JJ.

Nánábhái Haridás, for the accused :—It is wrong in principle that a Magistrate who has the power of passing "such order in the case as he may deem proper" should not, before he passes sentence, hear the accused, even though a conviction has already been recorded. A Subordinate Magistrate who convicts may consider a case to be of so serious a nature as to induce him to recommend the infliction of a heavier punishment than he himself can legally award, and yet the superior authority may think proper to record an acquittal, without calling for any more evidence. Where the Code allows the personal attendance of an accused person to be dispensed with, it does so only to a limited extent. In no case in which a sentence of imprisonment is to be passed does the Code dispense with the appearance of the accused, and even where a sentence of fine alone is to be pronounced it is left to the discretion of the trying authority to require such appearance or not. [LLOYD, J. :—When this court confirms a sentence of death the accused is not present before it.] But the passing of a sentence is different from its confirma-

tion, and even in confirmation cases where the accused chooses to appear by counsel the court cannot prevent it. And the jealousy of the Code in this respect is founded upon a very good reason. After the completion of the case, and the entry of the jury's verdict of guilty, it is the invariable practice of English Courts, and of the High Court when exercising original criminal jurisdiction, to ask the prisoner if he has anything to say why sentence should not be passed upon him; the prisoner may give evidence of good character, and induce the Judge to pass a lenient sentence.

Dhirajlál Mathurádás (Government Prosecutor), for the Crown:—I do not contend that in some cases it may not be desirable to require the accused to be present when sentence is passed upon him. My argument is that it is not imperative, and that, unless it is so, the present practice, which is very convenient, should not be departed from.

Cur. adv. vult.

GIBBS, J. (after recapitulating the facts of the case, continued):—Upon a reference from the Magistrate of Cánará, the question of the necessity for the appearance of the accused was brought before us in chambers. There was no argument, but only a discussion among the Judges, and it was thought that if accused persons were made to follow the migratory camp of the District Magistrate very great inconvenience and hardship would be caused to them, and that it was a kindness to exempt them from such inconvenience. Under this view the High Court ordered, in their Circular No. 1038 of 1866, that the accused person should, pending the disposal of the reference under Sec. 277 of the Criminal Code, be kept in the custody in which he was at the time of the trial. Since hearing the argument of Mr. Náuábhái in this case, my brother Lloyd and I came to the conclusion that the practice laid down by the resolution in chambers was not correct. Had the sections not contained the provision that the District Magistrate might pass "such order as he may deem proper," and had it confined his power to the passing of a sentence only, it might have been different—the practice might have been

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allowable; but as the District Magistrate can, and does frequently, reverse the conviction of the Subordinate Magistrate and direct the release of the prisoner, it follows that the prisoner should always be present to offer to the District Magistrate such reasons as he may have against the finding of the Subordinate Magistrate, or to state his plea, if he has one, for a lenient punishment. We, therefore, felt it our duty to bring this to the notice of our brother Judges in chambers, and they, after a reconsideration of the matter, have expressed their concurrence with us in the decision we shall now give, namely, that the District Magistrate's sentence, having been passed in the absence of the prisoners, is illegal.

We shall not, however, direct a fresh sentence to be passed, as the periods of their sentences have nearly expired; they will, therefore, be discharged.

Order accordingly.

NOTE.—The following Circular has since been issued by the High Court:—

"Sec. 277 of the Code of Criminal Procedure having been recently brought to the notice of the Chief Justice and Judges in chambers, and a case arising under it having also been lately argued in court before a Divisional Bench, it appears to the Chief Justice and Judges that Circular No. 1038 of 11th July 1866 cannot be sustained, and that the accused person is entitled to be present before the District Magistrate when he takes into consideration the finding and proceedings of the Subordinate Magistrate; and that this is so even though the District Magistrate does not examine the parties, or recall and examine any witness who may have already given evidence in the case, or may not call for and take any further evidence; inasmuch as the accused person will be at liberty to contend before the District Magistrate that there is no sufficient case made out against him for a conviction, and the District Magistrate, if he concur in that view, will be at liberty to order an acquittal and discharge. Circular No. 1038 is, therefore, cancelled."

REG. v. KA'LUBHA'I MEGHA'BHA'I *et al.*

1870. June 9.

Sentence not exceeding one Month—Appeal where one of the co-accused is sentenced to imprisonment exceeding one month—Crim. Proc. Code, Sec. 411.

Where several persons were tried together and convicted, under Sec. 147 of the Indian Penal Code, of rioting, and two of them were sentenced to pay each a fine of Rs. 50, or in default of payment to undergo rigorous imprisonment for a month, and the others were sentenced to a severer punishment, the Session Judge entertained an appeal by all the prisoners, being of opinion that the test, under Sec. 411 of the Code of Criminal Procedure, as to whether a case is appealable, is the maximum sentence passed in it :

The High Court annulled the order of the Session Judge passed with reference to those of the accused who had been only fined Rs. 50, and restored the original sentences passed upon them.

THIS was a reference from the Magistrate of the District of Ahmedábád. The accused, eight in number, were tried and convicted by G. H. Johns, Magistrate F. P., of rioting. Four of the accused were sentenced each to a year's rigorous imprisonment and a fine of Rs. 100, two to a fine of Rs. 100, and the remaining two to a fine of Rs. 50; or, in default of payment, to rigorous imprisonment for six months, two months, and one month respectively. All the prisoners appealed to the Session Judge, who entertained the appeal and reduced all the sentences, though he declined to interfere with the convictions. The Session Judge recorded the following reasons for entertaining an appeal from those persons who were fined only Rs. 50 :—

"The other two accused persons—No. 7, Kálubhái Megháhbhái, and No. 8, Jivábhái Dhingábhái, who had been convicted in this case, and sentenced respectively to pay a fine of Rs. 50, or to undergo rigorous imprisonment for one month—also appealed, in the same petition with the others. I reserved for consideration the question as to whether or not their right to appeal is barred by Sec. 411 of the Criminal Procedure Code.

"If it were not for the ruling of the High Court of Calcutta, that jurisdiction over the appeal of one person convicted by a Magistrate does not give constructive jurisdiction to a Court of Session over the convictions of other persons, whose sentences are less than the sentence sufficient to make

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a case appealable (Cal. H. C. No. 922 of 1864*), I would have no hesitation in assuming appellate jurisdiction over the convictions of those persons sentenced only to fines of Rs. 50, and in default to imprisonment for one month. Respect for the ruling of the Calcutta Court has caused me to hesitate, but on consideration I feel so convinced that the ruling is erroneous that I must refuse to be bound by it.

"Sec. 411 of the Criminal Procedure Code runs thus :—

"'In all cases in which a Court of Session, or the Magistrate of a District, or other officer exercising the powers of a Magistrate, shall pass a sentence of imprisonment not exceeding one month, or of a fine not exceeding fifty rupees, no appeal shall be allowed.'

"In this case sentences above the limit laid down were passed, and in consequence, in my opinion, the whole case becomes appealable. The law does not say, as it easily might, if such were the intention of the Legislature, that a person sentenced to imprisonment for a term not exceeding one month, or to a fine not exceeding Rs. 50, is precluded from appealing, but distinctly sets forth the sentence passed in the case, as the test whether the case is appealable, meaning, as I take it, the *maximum sentence* passed in the case.

"The reason of the law appears to me to be, that appellate machinery is not to be set in motion in cases of trifling moment, and that the maximum amount of penalty inflicted in a case is a fair test of its importance.

"Moreover, I think that if a reasonable doubt arise in interpreting a statute as to appellate jurisdiction, the benefit of the doubt should be given to the jurisdiction. Appellate procedure is an equitable procedure, and the largest, not the smallest, possible construction should be put on statute law affecting such jurisdiction, '*ampliare justitiam.*'

"Further it appears that to hold that some convicts in a case may appeal, and that others in the same case may not appeal, leads to a serious difficulty. Take a supposititious case. It is to my mind impossible that it can be good law

* Referred to under Sec. 411 in Criminal Procedure Code by Prinsep.

to hold that if A, B, and C are sentenced respectively to fines of Rs. 1,000, Rs. 500, and Rs. 50, on appeal A and B may get off scot-free, while C, whose case is on all fours with theirs as to proof, but who is entitled to leniency (in the opinion of the original court) on other grounds, is to be mulcted in Rs. 50. I cannot read the law so as to arrive at such an inequitable result. It is with extreme diffidence that I go contrary to the Calcutta precedent, but my opinion is so strong on the point that I must decline to submit it to less authority than that of the High Court to which I am subordinate. I affirm the convictions, and reduce the sentences to fines of Rs. 20 each, in default rigorous imprisonment for fifteen days."

The reference was considered by WESTROPP, C.J., and LLOYD, J.

PER CURIAM :—The Court annuls the order of the Session Judge, and restores the original sentences passed upon those convicts who were fined only Rs. 50 by the Magistrate F. P.

REG. v. HANMA'PA' bin MALA'PA'.

June 9.

Sentence passed by Subordinate Magistrate—Annulment of Sentence of District Magistrate—Commitment to Court of Session.

Where a District Magistrate annulled a conviction passed by a Subordinate Magistrate, 1st Class, of voluntarily causing hurt by means of an instrument for stabbing, cutting, &c., under Sec. 324 of the Indian Penal Code (an offence cognisable by the Subordinate Magistrate), and directed the Subordinate Magistrate to commit the accused to the Court of Session for trial on the charge of voluntarily causing grievous hurt by means, &c. (a charge cognisable by the Court of Session) :

The High Court annulled the order of the District Magistrate, and restored the conviction and sentence of the Subordinate Magistrate.

THE accused was tried before Shankar Pándurang Pandit, Subordinate Magistrate of the 1st Class in the district of Kaládgi, for the offence of voluntarily causing hurt by an instrument of cutting, under Sec. 324 of the Indian Penal Code, and was sentenced to suffer rigorous imprisonment for six months, and pay a fine of Rs. 150, or in default to suffer

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rigorous imprisonment for a further period of a month and a half.

An appeal was made to the Magistrate of the Kaládgi District, who, being of opinion that the facts of the case disclosed the infliction of grievous hurt by a dangerous weapon, an offence exclusively cognisable by a Court of Session, cancelled the conviction and sentence, and ordered the Subordinate Magistrate to commit the accused to that court, under Sec. 326 of the Indian Penal Code.

The Assistant Session Judge, before whom the accused was to be tried, was of opinion that the District Magistrate had no power to cancel the conviction and sentence passed by the Subordinate Magistrate, as the latter had jurisdiction to try the offence of voluntarily causing hurt by a cutting instrument, with which the accused was charged, and that if, in the opinion of the District Magistrate, the evidence disclosed a more serious offence, the matter should have been referred to the High Court. The Assistant Session Judge, therefore, postponed the trial of the case, and requested the Session Judge to make a reference to the High Court.

This reference was considered by WESTROPP, C.J., and LLOYD, J.

PER CURIAM:—The Court annuls the order of the District Magistrate (who had himself annulled the conviction before the Subordinate Magistrate, 1st Class), and restores the conviction and sentence of the Subordinate Magistrate, and directs that the remaining unexpired portion of the sentence be carried out, and that the time, during which the prisoner has been in custody while awaiting trial before the Court of Session, be counted as part of the time awarded in the sentence.

Order accordingly.

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June 13.

REG. v. SHOWDAR GHENAR *et al.*

Opium—Smuggled Opium, Possession of—Penalty—Reg. XXI. of 1827, *Sec.* 4.

Where several persons knowingly harbour, keep, or conceal a parcel of smuggled opium, one penalty of double the value of such opium, and of double the amount of duty leviable upon it, only, is recoverable, under Reg. XXI. of 1827, Sec. 4.

Reg. v. *Vakatchand* (1 Bom. H. C. Rep. 50) overruled.

Reg. v. *Rajgur Veneegur* (3 Morris's Fouzdári Rep. 673) approved.

THE accused, two in number, were tried and convicted by G. H. Johns, Magistrate F. P. in the Ahmedábád district, of keeping smuggled opium; and the forfeiture of double the value of the smuggled opium, and of double the amount of duty leviable upon it, was ordered to be divided equally between them. The Magistrate of the District of Ahmedábád, considering this decision contrary to the ruling of the High Court in *Reg.* v. *Vakatchand* (*a*), referred the case for the orders of the High Court.

The case came on for hearing on the 18th of November 1869, before GIBBS and MELVILL, JJ., who referred it to a Full Bench, consisting of COUCH, C.J., WARDEN, WESTROPP, GIBBS, and MELVILL, JJ.

In the absence of COUCH, C.J., (*b*) his judgment was this day read on his behalf by WESTROPP, C.J.

COUCH, C.J.:—This is a conviction, under Reg. XXI. of 1827, Sec. 4, of knowingly keeping smuggled opium, by which two persons have been convicted of the offence; and the forfeiture of double the value of the opium, and double the amount of duty leviable on it, has been equally divided between them; and, as this is contrary to the decision of this Court in *Reg.* v. *Vakatchand et al.* (*suprà*), the case has been referred to us by the Magistrate of Ahmedábád.

As there was in that case an unanimous ruling of six of the then Judges of the High Court, Sir Joseph Arnould and

(*a*) 1 Bom. H. C. Rep. 50.

(*b*) Since the case was heard, appointed Chief Justice of Calcutta.

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myself being the only Judges who appear not to have been consulted, I thought it right that the question should be reconsidered by an equal number of Judges, including Mr. Justice Westropp, who is now the only remaining member of the Court who was a party to that decision.

The question must be determined by the language of the Regulation. It is a penal law, and is to be construed strictly; but by this is meant only that it is not to be so extended by implication, and beyond the legitimate import of the words used, as to embrace cases or acts not clearly described by such words. And courts are bound to give effect to the plain and obvious meaning of the words, and not narrow the construction: per Buller, J., in the case of *The King* v. *The Inhabitants of Hodnett* (*c*). They must search out and follow the true intent of the law. "You must look at the statute to see whether every person is to be punished, or every offence to be punished. If every offence is to be punished, there is to be one penalty only, however large the number of persons that committed it; but if there are several penalties on each person it is obviously otherwise:" per Alderson, B., in *Reg.* v. *Dean* (*d*). An offence under Sec. 4 of the Regulation is one which may be committed by two or more persons jointly, and is not, like giving false evidence, an offence which is several in its nature. Several persons may knowingly harbour, or keep, or conceal one parcel of opium, and the words "in case any person or persons shall," &c., "such person or persons shall for *each such act* forfeit," in my opinion, show that it was intended to be treated as one offence, for which there was to be one penalty of double the value and double the amount of duty. And the penalty not being a fixed sum, but varying according to the quantity of opium kept or concealed, is more consistent with its being a single one than with there being several penalties. Although I am of this opinion, I should have hesitated to decide in opposition to the case of *Reg.* v. *Vakatchand* if there had not been the contrary decision of the Ṣadr Adálat. I think we are at liberty to consider whether that decision was rightly over-

(*c*) I. Term Rep. 101. (*d*) 12 M. & W. 43.

ruled, and, if we think it was not, to restore its authority. Most of the English decisions on this subject are collected in Paley on Convictions, pp. 262—265 (5th ed.). But as the construction in each case must depend upon the words of the particular statute, and there is no uniformity of language in them, these decisions are, I think, useful only as illustrations. Looking at the words of the Regulation in this case, I am of opinion that the award of one penalty of double the value and double the amount of duty is right, and that we ought not to interfere with it.

WARDEN, J., who was absent on leave when the judgment was pronounced, had previously intimated his concurrence in it.

GIBBS, J.:—I concur.

MELVILL, J.:—I am of the same opinion.

WESTROPP, C.J.:—As one of the Judges who, in 1863, took part in deciding *Reg.* v. *Vakatchand* (*e*), I think that, as none of the English authorities, affecting the third point there made, were then cited, the view taken of Reg. XXI. of 1827, Sec. 4, so far as it concerns that point, is fairly open to reconsideration. Although I have not a vivid recollection of that case, or of the reasoning which led the Court to confirm the decision of the Session Judge of Súrat, and to overrule that of the Ṣadr Adálat in *The Queen* v. *Rajgur* (*f*), yet I may say with certainty that the Judges who heard the argument would not have consulted three other Judges on the third point, as it appears from the report of *Reg.* v. *Vakatchand* that they did, unless some doubts had been entertained as to the liability, under the Regulation, of *each* of the persons convicted to pay a forfeit of double the value of the smuggled opium, and double the amount of duty leviable thereon.

The English decisions would appear to show (I.) that, if the penalty be imposed by an Act of the Legislature upon each person convicted, even where the offence would in its own nature be single, or (II.) if the quality of the offences be

(*e*) 1 Bom. H. C. Rep. 50. (*f*) 3 Morris's Fouzdári Rep. 673.

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such that the guilt of one person may be distinct from that of the others, in either of these cases the penalties are several: Paley on Convictions, p. 199, 3rd ed.; p. 262, 5th ed.

Of the first class of cases, namely, where the offence is single, but the penalty is imposed upon each person convicted, *The King* v. *Drake* (*g*) is an example. It was decided in Michaelmas term 2 Jac. II., in the King's Bench, upon the Stat. 13 Car. II., c. 10, and not upon the Stat. 3 Wm. & M., c. 10, as erroneously stated in Paley on Convictions (*h*). The Stat. 13 Car. II., c. 10, enacted, for the prevention of the unlawful coursing &c. of red or fallow deer in any forest &c., that "*every* person so offending shall forfeit for *every* such offence the sum of £20." Under it William Drake and Henry Crymes were, upon one information, summarily convicted of coursing a deer in a park with hounds, and a penalty of £20 imposed upon each of them. Upon *certiorari* these several penalties were held good. In *Reg.* v. *King* (*i*), decided in Hilary term 10 Anne, in the Queen's Bench, a similar ruling was made on the Stat. 3 Wm. & M., c. 10, s. 2, aimed against the same offence, and enacting that "*every* such person so offending by unlawful coursing," &c. "shall forfeit for *every* such offence the sum of," &c. Another instance of this class of cases is *Reg* v. *Dean* (*j*), decided in 1843 by the Court of Exchequer upon the 44th section of the Stat. 3 & 4 Wm. IV., c. 53, which enacts that "*every* person" who shall be concerned in the unshipping of goods the duties for which have not been paid, &c. shall forfeit either the treble value thereof, or be liable to the penalty of £100. Dean and Candy, who were partners in trade, having been separately convicted of the same offence under that Act, were each held to be liable to the penalties imposed by it. Alderson, B., said (*k*) "You must look at the statute to see whether every *person* is to be punished, or every *offence* to be punished. If every offence

(*g*) 2 Shower K. B. 489 (3rd ed., p. 641).
(*h*) Ibid., 3rd. ed., p. 200; 5th ed., p. 263. (*i*) 1 Salk 182.
(*j*) 12 M. & W. 39, S. C. 13 L. J., N. S. Exch. 33.
(*k*) 12 M. & W. 43, *et iterum* 44.

is to be punished, there is to be one penalty only, however large the number of persons that committed it; but if there are several penalties on each person it is obviously otherwise." *In re Hartley and others* (*l*), Mellor, J., upheld and enforced a conviction under Sec. 63 of the Public Health Act, 1848 (Stat. 11 & 12 Vict., c. 63), which conviction charged that, at the stall of the three accused persons, a piece of meat intended for the food of man and wholly unfit for human food, as they well knew, belonging to the three, and in their custody, was found by the Inspector of Nuisances; and which conviction proceeded to convict each of the three separately for the offence in a penalty of 20 shillings, and costs, £1 12*s.* 6*d.* There were three other convictions, in like form, in respect of three other pieces of bad meat found by the Inspector at the same stall on the same day, and in each of these cases a penalty of 20*s.*, and 15*s.* costs, was adjudged against each,* and upheld and enforced by Mellor, J. The statute, after giving power to the Inspector "to enter into and inspect any shop, building, stall, &c. kept or used for the sale of butcher's meat," &c., and to examine and seize any animal, carcase, meat, &c., which may be therein, and which may appear to him "to be intended for the food of man and to be unfit for such food," and also empowering a Justice of the Peace to order the same to be destroyed or, &c., proceeds thus: "and the person to whom such animal, carcase, meat, &c. belongs, or in whose custody the same is found, shall be liable to a penalty not exceeding ten pounds for every animal, or carcase, fish, or piece of meat, flesh, or fish, &c., so found."

Of the second class of cases, namely, where the guilt of one person may be distinct from that of the others, *Rex* v. *Clark and others* (*m*) is an example. It was a conviction of three

(*l*) 31 L. J., N. S. Mag. Ca. 232. (*m*) Cowper 610.

* NOTE.—The application in this case was for a rule to the Justices to issue a warrant to levy, by distress and sale, the penalties. The affidavits made in answer to the *rule nisi* granted stated that one of the persons convicted was master and owner of the stall and owner of the meat, and that the two other persons convicted were his servants. The *rule nisi* was eventually made absolute.

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persons by a jury upon an information filed by the Attorney General upon the Stat. 8 Geo. I., c. 18, s. 25, which enacted that if "any person or persons whatsoever shall assault, resist, oppose, molest, obstruct, or hinder any officer or officers of the Customs or Excise, in the due seizing or securing any brandy, arrack, rum, spirits, &c." seizable under that or other Acts, "or shall by force or violence rescue, or shall cause or procure to be rescued, any brandy," &c., &c., "the party or parties so offending shall for every such offence forfeit and lose the sum of £40." Mr. Buller moved for an arrest of judgment upon this objection, "that the verdict against the defendants was for three several sums of £40 each; whereas by the Act of Parliament the offence was entire, and only one penalty of £40 given for one and the same offence." He cited *Hardyman* v. *Whitaker*, *Marriott* v. *Shaw*, and *Partridge* v. *Naylor*, to all of which I shall presently refer, and, amongst other arguments, urged that the statute did not say that "*every* person offending shall for *every* such offence forfeit," &c., but "if any person or persons shall," &c., "the party or parties so offending shall for every such offence forfeit and lose the sum of £40," and that the words "persons" and "parties" manifestly showed that the Legislature meant to provide against a joint offence by several persons, but not to multiply the penalty on that account. The Court of King's Bench, however, refused to arrest the judgment. Lord Mansfield said that the true reason of the cases cited in support of the motion, and the distinction between those cases and that before him, was this: "Where the offence is, in its nature, single, and cannot be severed, there the penalty shall be only single; because, though several persons may join in committing it, it still continues but one offence. But where the offence is in its nature several, and where every person concerned may be separately guilty of it, there each offender is separately liable to the penalty, because the crime of each is distinct from the offence of the others, and each is punishable for his own crime." Although not actually naming them, yet evidently alluding to *Partridge* v. *Naylor*, and apparently also to *Marriott* v. *Shaw*, he treated the enactments on which the

cases arose as respectively creating each only one offence, and he then proceeded thus: "But this statute (8 Geo. I., c. 18, s. 25) relates to an offence in its nature several, a several offence at common law; and the statute adds a further sanction against that which each man must commit severally—one may resist, another molest, another run away with the goods; one may break the officer's arm, another put out his eye. All these are distinct acts; and every one's offence entire and complete in its nature. Therefore, each person is liable to a penalty for his own separate offence." The case of *The King* v. *Hube and others* (*n*) belongs to this second class of cases.

The enactment on which the accused persons in the present case have been convicted (Reg. XXI. of 1827, Sec. 4) is as follows:—"In case any *person* or *persons* shall knowingly harbour, or keep, or conceal, or shall permit to be harboured, or kept, or concealed, any smuggled opium, whether or not he, or she, or they have property or interest therein, such person or persons shall *for such such act* forfeit double the value of such opium, to be ascertained on its sale by auction, as prescribed in Sec. VI., cl. 5, and double the amount of duty leviable on it, which forfeitures shall be enforced in the mode prescribed in Sec. 7." It is not "every person" offending against this Regulation "shall forfeit," but "any person or persons." This case, therefore, does not fall within the first class of cases which I have mentioned, such as *The King* v. *Drake*, *Reg.* v. *King*, and *Reg.* v. *Dean*. Nor do I think that it falls within the second class of cases, such as *Rex* v. *Clarke* and *The King* v. *Hube*. It seems to me rather to belong to a third class, of which *Reg.* v. *Rowan McNaghten* (*o*) is an instance. There an information founded on the Stat. 3 & 4 Wm. IV., c. 53, s. 44, charged that a party "did knowingly harbour and conceal, and also did knowingly permit and suffer to be harboured and concealed," certain contraband articles; and the conviction thereon adjudged him guilty of the offence so charged; and it was held by the Court of Queen's Bench in Ireland that the information did

(*n*) 5 T. R. 542. (*o*) 9 Ir. Law Rep. 93.

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not charge two offences, and that there was no duplicity in the conviction. Upon another ground, however, not touching the present case, namely, the insufficiency of the evidence, that conviction was quashed. *The King* v. *Bleasdale and another* (*p*) belongs also to this third class of cases. It turned on the Stat. 5 Anne, c. 14, s. 4, which enacts "that if any person or persons not qualified" &c. "shall keep or use any greyhounds, setting dogs, hares, lurchers, tunnells or any other engine to kill and destroy the game, and shall be thereof convicted," &c., "the person or persons so convicted shall forfeit the sum of £5." The defendants were convicted in penalties of £5 each under that statute, for using a greyhound to destroy game without being duly qualified, but the Court of King's Bench held that there was only one offence, and that the Magistrate should only have convicted them in one penalty. The conviction was, therefore, quashed. In the earlier case of *Hardyman* v. *Whitaker* (*q*), on the same statute, like doctrine was laid down. The Court there said: "As to the third objection, there is no doubt but that the law allows the charging several persons as joint offenders, and in this case the statute itself has considered several as being joint offenders: for it says that if any person or persons shall keep lurchers, and be thereof convicted, the person or persons so convicted shall forfeit £5; so that it gives one penalty of £5 to be paid by the person or persons who act against the statute. The statute has, therefore, made it a joint offence in all persons concerned, and has made them all subject to but one forfeiture, and they are, consequently, within the rule of the Common Law, punishable jointly."

Patridge v. *Shaw*, argued Easter term 38 Eliz., and decided Hilary term 39 Eliz., is a strong case and very peculiar. It has been reported by several reporters (*r*), the best note of it being perhaps that of Noy, who mentions it twice, first as *Patridge* v. *Naylor*, and secondly, and more fully, as *Patridge* v. *Emson*. It was an action of debt against three per-

(*p*) 4 T. R. 809.

(*q*) Buller N. P. 189; S. C. 2 East 573, 574, *in notis*.

(*r*) Noy 52, 62; Moore 453; Gouldsb. 145; Cro. Eliz. 480.

sons upon the Stat. 1 & 2 Ph. & M., c. 12, s. 1, to recover penalties for impounding a distress in several pounds, which statute, so far as is material, is "that no cattle or other goods distrained or taken by way of distress, for any manner of cause at one time, shall be impounded in several places, whereby the owner or owners of such distress shall be constrained to sue several replevies for the delivery of the said distress so taken at one time, upon pain *every* person offending contrary to this Act shall forfeit to the party grieved for *every* such offence 100 shillings and treble damages." The Court of Common Pleas (*s*) was divided on the question whether the three defendants should every of them forfeit 100 shillings severally, or but all together 100 shillings. The majority of Judges in that court, including Walmisley, J., appear to have held that each of the three defendants should forfeit 100 shillings. But that judgment was reversed by the Court of Error, which, commenting on the words "every person offending," said "but the meaning of the statute is that the penalty shall be referred to the offence, not the persons; then, because there was but one offence in all the defendants, there shall be but one £5 (100*s*.) forfeited." Popham, C.J., said: "If two defendants distrain, and they alike drive the distress, there shall be only one action and one penalty." Gawdy, J., said: "Upon the statute that enacts that every one that sues in the Admiralty, for a thing done upon the land, shall forfeit £10 there, if two commence an action, *contra formam statuti*, yet but one £10 shall be forfeited; so upon the statute of 5 Eliz. of forgery, against twenty, but one double damages shall be given against all." It should be observed as to the Stat. 1 & 2 Ph. & M., that its main object would appear to be compensation to the party injured by the several impoundments, and that one penalty of 100 shillings and treble damages are an abundant satisfaction to him for any wrong which he may have suffered, and a reason for not multiplying penalties &c. in such a case, where several persons are concerned, and for distinguishing *Patridge* v. *Naylor* from the first class of cases which I have mentioned.

(*s*) Gouldsb. 145.

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In *Marriott* v. *Shaw* (*t*) a conviction *super præmissis* for three penalties of £5 each under the Stat. 5 Anne, c. 14, s. 4, for killing several hares, was held to be bad, where it appeared that all was done on the same day; for the statute did not give £5 for every hare, it being all but one offence.

Alluding apparently to *Patridge* v. *Naylor*, and perhaps also to *Marriott* v. *Shaw*, Lord Mansfield, in *Rex* v. *Clarke*, said: "One, two, three, or four may impound wrongfully; it still is but one act of impounding; it cannot be severed. It is but one offence, and, therefore, shall be satisfied by one forfeiture. So under the Stat. 3 Anne, c. 14, for the preservation of game, killing a hare is but one offence in its nature. Whether one or twenty kill it, it cannot be killed more than once. If partridges are netted by night, two, three, or more may draw the net, but still it constitutes only one offence" (*u*).

With regard to the words "for each such act" which occur in the Regulation here under consideration, it is important to observe that there is nothing in the papers now before us, so far as I can perceive, to show that there were more parcels of opium than one found in the custody of the persons convicted, and that the keeping and concealing seems to have been their joint act. The same remark would seem to be applicable to *Reg.* v. *Vakatchand* (*v*) and *The Queen* v. *Rajgur* (*w*). Upon a careful reconsideration of those cases, and of Reg. XXI. of 1827, Sec. 4, with reference to the English authorities, I have come to the conclusion that the safer view of the Regulation was that taken in *The Queen* v. *Rajgur*, and that *Reg.* v. *Vakatchand* ought not to be followed. The present case seems, in its facts, to be on all fours with those two cases, and to fall, in point of law, within the third class of decisions, already mentioned, made upon enactments in which the penalty is neither expressly, nor by necessary implication, imposed upon each offender, and in which the offence itself is single in its nature, although committed by more persons than one.

(*t*) Comyn R. 274, 275. (*u*) Cowper 612. (*v*) 1 Bom. H. C. Rep. 50.
(*w*) 3 Morris's Fouzdári Rep. 673.

If, notwithstanding words creating some difficulty in the interpretation of an Act, its general intent be clear, the court is bound to give effect to that intent, although the Act be of a penal nature or relating to the revenue, and is not at liberty either to extend or to narrow the plain scope of the Act (*x*). But if the court, after a careful consideration, not only of the language of the passage under interpretation, but also of the context and subject-matter of the Act, find the meaning of the Legislature doubtful, then, if the enactment be of a penal character, or relating to the revenue, it should be construed strictly as regards the Crown, and liberally towards the subject (*y*).

Looking to this rule of construction of statutes, and to the English decisions as to penalties, although the language of Reg. XXI. of 1827, Sec. 4, is sufficiently comprehensive to signify that each offender, where there are several, should be visited with the penalty, yet as that language is at least equally consistent with the supposition that the Legislature intended that there should be only one penalty inflicted upon all of the offenders jointly, and the context and subject-matter of the Regulation do not, I think, show that the wider construction is the true one, I concur with Sir Richard Couch, C.J., and the other learned Judges who have considered this case, in saying that the Magistrate was right in imposing upon the parties convicted only one forfeiture of double the value of the opium, and double the amount of the duty, and in apportioning that forfeiture equally between them.

Papers returned.

(*x*) 5 Wheaton (U. S.) Rep. 95; 1 T. R. 96; Dwarris 738, 739 (1st ed.); Drury *temp.* Sugden 227; S. C. 6 Ir. Eq. R. 288.

(*y*) 3 Bing. 580, 581; Dwarris 738, 749; 3 Taunton 177, 200.

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June 13.

REG. v. KA'DIR valad BA'LU.

Evidence—Wife's Evidence against Husband—Mofussil Law.

The evidence of a wife is admissible against her husband in a criminal case in the Mofussil.

Reg. v. Khyroollah (*a*) followed.

(*a*) 6 Calc. W. Rep., Cr. R. 21.

THIS was a reference made by G. F. Sheppard, Magistrate of the District of Tháṇá, for the orders of the High Court.

Mr. Pearson, First Class Subordinate Magistrate in the Tháṇá district, dismissed a complaint of causing the death of a child, on the ground that the evidence of the complainant was inadmissible against the accused, who was her husband.

The reference was heard before WESTROPP, C. J., and LLOYD, J.

PER CURIAM :—Following the case of *Reg.* v. *Khyroollah and others* (*ubi suprà*), the Court reverses the order of the Subordinate Magistrate, Mr. Pearson, and directs him to proceed with the investigation of the case, and to take the evidence of the wife of the accused.

Order accordingly.

June 15.

REG. v. VYANKATRA'V SHRINIVA'S.

Search without Warrant—Crim. Proc. Code, Sec. 135—*Ind. Pen. Code, Sec.* 99.

An officer, subordinate to an officer in charge of a police station, who was deputed by the latter to make an inquiry under Sec. 135 of the Code of Criminal Procedure, attempted without a search-warrant to enter a house in search of property alleged to have been stolen, and was obstructed and resisted :

Held (applying Sec. 99 of the Indian Penal Code) that, even though the police officer was not strictly justified in searching the house without a warrant, the person obstructing and resisting could not set up the illegality of the officer's proceeding as a justification of his obstruction, as it was not shown that that officer was acting otherwise than in good faith and without malice.

A Magistrate acting judicially should not import into the case before him his previous knowledge of the character of the accused, but should determine his guilt or innocence upon the evidence given in the case.

THE accused was tried and convicted before the Subordinate Magistrate of Bágalkoṭ of the offences of voluntarily

obstructing a public servant in the discharge of his public functions, and intentionally offering resistance to the lawful apprehension of certain persons, and was sentenced to undergo rigorous imprisonment for three months and pay a fine of Rs. 200, or in default to suffer further rigorous imprisonment for twenty days, for the former offence; and to undergo six months' rigorous imprisonment and pay a fine of Rs. 200, or in default to suffer further rigorous imprisonment for a month and a half, for the latter offence. In appeal, the District Magistrate, Mr. Armstrong, upheld the conviction and sentences.

An application having been made to the High Court for the exercise of its extraordinary jurisdiction, the record and proceedings were sent for, and it was further ordered that the accused should be set at liberty on bail until the disposal of the application.

The record and proceedings having been sent up, the application was heard before GIBBS and MELVILL, JJ.

Anstey (with him *Nánábhái Haridás*) for the applicant.

Dhirajlál Mathurádás (Government Prosecutor) appeared in support of the conviction.

The judgment of the Court, from which the facts sufficiently appear, was delivered by

MELVILL, J. :—The prisoner has been convicted, 1*st*, under Sec. 186 of the Penal Code, for obstructing the police in the search of a house; and, 2*ndly*, under Sec. 225, for resisting the lawful apprehension of certain persons.

The acts which the prisoner is found to have committed undoubtedly amount to obstruction and resistance.

But it has been submitted to us, as a question of law, that such obstruction and resistance were justified, inasmuch as the police had no right to search a house without a search-warrant, nor to arrest persons who had really committed no offence.

It appears that the constable who conducted the search was a subordinate officer deputed by the officer in charge of the

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police station to make an inquiry under Sec. 135 of the Code of Criminal Procedure. Such a subordinate officer does not seem to be empowered without a warrant to enter a house in search of property, though he may certainly do so in search of a person who is charged with having committed an offence for which he is liable to be arrested without a warrant (Crim. Proc. Code, Secs. 106 and 107). In the present case it would be difficult to say that the police were not as much in search of persons as of property. But it is not necessary to draw any such fine distinctions. Sec. 99 of the Penal Code provides that there shall be no right of private defence, either of person or property, against an act which does not reasonably cause the apprehension of death or of grievous hurt if done, or attempted to be done, by a public servant acting in good faith under colour of his office, *though that act may not be strictly justifiable by law.* It has not been shown to us that the police were acting otherwise than in good faith, and, therefore, it must be held that, even though they were not strictly justified in searching a house without a search-warrant, yet the prisoner cannot set up the illegality of their proceeding as a justification of the obstruction which he offered to the search.

As regards the resistance offered by the prisoner to the apprehension of certain persons, it is sufficient to say that the police charged those persons with theft, an offence for which the police may arrest without warrant; and that, whether or not a theft had been really committed, any resistance to their apprehension was illegal if the police were acting *bonâ fide* and without malice; and it has not been shown to us that they were not so acting.

The Court must decide, then, that, if the facts be as found by the courts below, the conviction recorded against the prisoner is good.

This court is bound to accept the finding on facts by the courts below, unless it appear that any material evidence was improperly admitted or rejected. The prisoner has put in an affidavit in which he declares that the Subordinate Magistrate of Bágalkot rejected the evidence which he ten-

dered in his defence. A reference to the prisoner's petition of appeal to the Magistrate of the District shows that the improper rejection of evidence was one of the grounds of appeal; but there is nothing in the Magistrate's finding to indicate that this allegation of the appellant received any consideration. On turning to the examination of the prisoner, as recorded by the Subordinate Magistrate, the Court finds that it does not bear out the statement contained in the prisoner's affidavit, and they must, therefore, reject that statement if they accept the examination as correct; but this the Court is unable to do. Sec. 205 of the Code of Criminal Procedure requires that the examination of an accused person shall be attested by the signature of the Magistrate, who shall certify under his own hand that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person. Now the examination recorded in this case certainly bears such an attestation and certificate as is required by the above section; but from the papers in the case it appears that the attestation and certificate were added by direction of the Magistrate of the district after the appeal had been disposed of. This was a most irregular proceeding. When the case was before the Magistrate in appeal the recorded examination of the prisoner was an incomplete document. The want of the Subordinate Magistrate's attestation and certificate was not necessarily fatal to it; but the Magistrate was bound, before acting on it, to take evidence to show that it contained accurately the whole of the statement made by the prisoner: *Reg* v. *Kallá Lakhmáji* (*a*). As it is, the Court must conclude that the Magistrate either rejected the appeal without any consideration at all of the appellant's statement that his evidence had been refused, or else that he rejected that statement solely on the strength of a document which was legally incomplete and inadmissible. On either supposition the prisoner has been prejudiced, and has a right to demand that the case should be reopened and reconsidered; and, as this court, sitting as a court of revision, cannot deal with questions of fact, but only

(*a*) 2 Bom. H. C. Rep., p. 419 (p. 395, 2nd. ed).

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with questions of law, the only course open to them is to direct that the appeal be reheard.

But there are circumstances in the case which seem to the Court to render it desirable that the appeal should not be reheard by the same officer. The finding of the Magistrate of the District in appeal, equally with that of the Subordinate Magistrate of Bágalkot, indicates the strongest prejudice against the prisoner. There may, or may not, be good reason for such prejudice. It is quite right that a Magistrate should be acquainted with the character of persons living within his district, and that he should look unfavourably upon those whom he believes to be turbulent and dangerous. But when called upon to decide judicially as to the truth of a specific charge brought against such a person, he ought to endeavour to divest his mind of all prejudice, and certainly ought not to assign, as a reason for believing the accused to be guilty, his own previous knowledge of the character of the accused. Such passages as the following in the Magistrate's finding indicate a want of judicial impartiality :—

"From the Magistrate's intimate acquaintance with the character of the accused, he is quite satisfied that the petitioner got up the charges in the petition, to create a diversion in his favour.

"The constable has stated in this case that the accused threatened that, if he tried to arrest him, he would collect some fifty men and beat him; and the Magistrate believes the accused to have been just the man to carry out the threat."

And at the end of his finding the Magistrate has made the following remark :—

"The Magistrate, from a personal knowledge of some years, knows the accused, Vyankatráv, to be a man of a turbulent disposition."

The Court thinks it fair, not only to the accused, but to the Magistrate, that the latter should not again be required to perform so difficult a task as that of deciding without prejudice a charge brought against a person against whom the Magistrate admits that he entertains a strong prejudice.

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The order of the Court will be that the Magistrate's decision in appeal be reversed, and that the appeal be transferred, for rehearing on its merits, to the Session Judge of Belgáṁ. The appellant should continue at large on bail till the appeal is disposed of.

It should be pointed out to the Subordinate Magistrate that the examination of the complainant, on which the warrant for arresting the accused was issued, was not signed by the complainant, as required by Sec. 66 of the Criminal Procedure Code, and that the warrant of arrest was informal, inasmuch as it purported to authorise the police to take bail, but did not specify the amount.

District Magistrate's order reversed, and appeal remanded to the Session Judge of Belgáṁ for retrial.

REG. v. DURGA'RA'M MA'DHAVRA'M.

June 16.

Fine by a Pound-keeper—Act XXVI. of 1850—*Act III. of* 1857, *Sec.* 6.

A fine levied by a pound-keepertis not a punishment imposed on conviction for an offence, and it is an error to hold that a person cannot be tried for an offence under Act XXVI. of 1850 because he has paid a fine under Sec. 6 of Act III. of 1857.

THE accused was tried before Máṇikji Kávasji Enti, Magistrate F. P. at Broach, for the offence of having, in violation of Sec. XXXVIII., cl. 16, of the Broach Municipality Rules, allowed his cow to stray about the City without a keeper. He was acquitted, for the following reasons recorded by the Magistrate:—

"He (the accused) admits the truth of the complaint, but objects to being convicted of the offence after having paid a fine under Sec. 6 of Act III. of 1857. The complainant himself admits that the fine was actually paid by the accused."

The Magistrate, being of opinion that the payment of poundage exonerated the accused from any further proceedings, acquitted him.

The Magistrate of the District, J. G. White, being of opinion that the acquittal of the accused could not be supported, referred the case to the High Court for its orders.

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The High Court had also sent for the record and proceedings of the case upon an examination of the monthly Criminal Returns of the district of Broach.

The case was reviewed by GIBBS and MELVILL, JJ.

PER CURIAM:—A fine levied by a pound-keeper is not a punishment imposed on conviction for an offence. The Magistrate F. P. was in error in holding that a person cannot be tried for an offence under Act XXVI. of 1850 because he has paid a fine under Sec. 6 of Act III. of 1857. The law (Criminal Procedure Code, Sec. 55) only provides that "a person who has once been tried for an offence and convicted or acquitted of such offence shall not be liable to be tried again for the same offence." No order by this Court is necessary, as the Magistrate of the District has it in his power to take such steps as he may see fit.

No order.

June 30.

REG. v. VA'HA'LA' JETHA'.

Prisoner's Confession—Confession taken before Magistrate not having jurisdiction to try—Crim. Proc. Code, Sec. 149.

The words "a Magistrate" in Sec. 149 of the Code of Criminal Procedure mean "any Magistrate," and not merely "the Magistrate having jurisdiction."

The practice of taking prisoners before Magistrates not having jurisdiction in the case, for the purpose of getting a confession recorded, is not generally desirable, but such a confession is legally admissible in evidence when duly proved.

THIS was a reference from A. A. Borradaile, Magistrate of the District of Ahmedábád, submitting an extract from the finding of W. M. P. Coghlan, Session Judge of Ahmedábád, in the case of the accused, who was tried and convicted of murder, and sentenced to transportation for life. The District Magistrate stated—

"The question is the legality of taking, and the weight to be attached to, confessions made before Magistrates not having jurisdiction.

"Mr. Coghlan argues against the legality, and declines to accept as judicial confessions all admissions made before Magistrates other than those vested with powers to commit,

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"I would, with much deference, draw their Lordships' attention to the fact that in this particular case—and the same is, I believe, done in every other in this district—a complete formal record was made, as directed by the Calcutta High Court. (*Vide* note to Sec. 149 of Currie's Procedure Code, 1869.)

"I am aware that the practice of recording confessions before another than the committing Magistrate is, as a rule, to be deprecated, but I cannot think that it is illegal.

"Sec. 149 sanctions the acceptance of confessions made before 'a' Magistrate."

The record and proceedings having been sent for, the reference was considered by GIBBS and MELVILL, JJ.

PER CURIAM:—The proceedings in this case have been called for, under Sec. 404 of the Criminal Procedure Code, on a report of the Magistrate of Ahmedábád.

The Court is of opinion that the words "a Magistrate" in Sec. 149 of the Criminal Procedure Code mean "any Magistrate," and not merely "the Magistrate having jurisdiction," as held by the Session Judge.

The practice of taking prisoners before Magistrates not having jurisdiction in the case, for the purpose of getting a confession recorded, is not generally desirable, but such a confession is legally admissible in evidence, when duly proved.

The above view derives some confirmation from a reference to Sec. 141 of the Draft Bill of Act VIII. of 1869, published at page 318 of the *Bombay Government Gazette* for 1868; that section is as follows:—

"No confession or admission of guilt made by any person whilst he is in the custody of a police officer shall be used as evidence against such person, unless it be made in the immediate presence of a Magistrate duly authorised to try, or to hold the preliminary inquiry into, the offence of which the person in custody is accused."

This seems to indicate that the framers of the Bill had it in contemplation to restrict the exception in Section 149 within narrower limits, but that the Legislature rejected the proposed change.

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July 14.

REG. v. GURNINGA'PA' *et al.*

Crim. Proc. Code, Sec. 270—Award of Compensation.

When, on a complaint being preferred to a Magistrate of an offence not coming within Ch. XV. of the Code of Criminal Procedure, the Magistrate alters it so as to bring it under Ch. XV., he cannot award compensation to the accused, under Sec. 270 of the Criminal Procedure Code, the offence originally complained of not being one for which compensation can be awarded.

THE Magistrate of the District of Kaládgi referred this case for the orders of the High Court with the following observations :—

"One Bágápá bin Giriápá complained to the 1st Class Subordinate Magistrate, Mr. Shankar Pándurang Pandit, that Gurningápá and eleven others had come to his house with the intention of robbing and murdering him.

"The Subordinate Magistrate, when the accused were before him for trial, wrote as follows :—

" 'The twelve accused in this case, being informed of the accusation against them by the complainant, deny having committed criminal trespass upon his house; the following evidence is, therefore, recorded.'

"The Subordinate Magistrate dismissed the complaint as frivolous and vexatious, and, under the provisions of Sec. 270 of the Code of Criminal Procedure, directed the complainant to pay to each of the accused a certain sum of money as compensation.

"The Subordinate Magistrate treated the case as one of criminal trespass upon the complainant's house, and as coming under Ch. XV. of the Criminal Procedure Code, under Sec. 270 of which compensation can be awarded; but, as the complaint made by the complainant was of intent to rob and murder, the Subordinate Magistrate ought, I think, to have inquired into it as such, or, if he though proper, as he did, to reduce the charge to one of criminal trespass, he ought not, I consider, to have awarded compensation, as the offences complained of against the accused

by the complainant were serious ones, and not offences coming under the provisions of Ch. XV. of the Criminal Procedure Code. 1870. REG v. GURNING A'PA' et al.

"The complaint by the complainant was not one coming within Ch. XV., and although the Subordinate Magistrate informed the accused that they were charged with criminal trespass, and brought the case within Chapter XV., I think that he was wrong in awarding compensation, as this complaint was not one within Ch. XV."

The reference was considered by GIBBS and MELVILL, JJ.

PER CURIAM:—The Court agrees with the Magistrate of the District that compensation could not, under the circumstances stated in the reference, be awarded.

Order accordingly.

REG. v. HI'RA' JI'VA'. July 14.

Crim. Proc. Code, Sec. 21—*Reg. XXI. of* 1827, *Secs.* 4, 7, *and* 10, *cl.* 4—*Opium—Smuggled Opium, Possession of—Offence—Jurisdiction.*

The offence of possessing above a quarter of a Súrat *ser* of opium not shown to have been legally obtained is exclusively cognisable by District Magistrates.

Reg. v. *Náráyan vd. Náthá and others* (Criminal Reference No. 209 of 1869) overruled.

THE proceedings and record in this case were called for by the High Court, under Sec. 404 of the Code of Criminal Procedure.

The case, the facts of which appear from the judgment, was considered by GIBBS and MELVILL, JJ.

GIBBS, J.:—We have called for the proceedings in this case, under the provisions of Sec. 404 of the Criminal Procedure Code, in order that we might have an opportunity of reconsidering our decision in the case of *Reg.* v. *Náráyan valad Náthá and others* (Criminal Reference No. 209 of 1869.)

Our decision in that case was that, under the last part of the amended schedule appended to the Criminal Procedure

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Code, a First Class Subordinate Magistrate has jurisdiction to try the offence of possessing above a quarter of a Súrat *ser* of opium not shown to have been legally obtained, under cl. 4, Sec. x. of Reg. XXI. of 1827.

We are now of opinion that this decision cannot be sustained. Sec. 21 of the Criminal Procedure Code provides that "the Criminal Courts of the several grades, according to the powers vested in them respectively by this Act, shall have jurisdiction in respect of offences punishable under the Indian Penal Code (Act XLV. of 1860), or under any special or local law, *except offences which are by any such law made punishable by some other authority therein specially mentioned*, and in the investigation and trial of the offences hereby declared to be within their jurisdiction shall be guided by the provisions of this Act."

Cl. 4, Sec. x. of Reg. XXI. of 1827 provides that a person having in his possession a greater quantity of opium than one quarter of a Súrat *ser* shall be liable to the penalties enacted in Sec. 4, to be enforced in the manner directed in Sec. 7. By Sec. 7 such penalty is to be enforced by information before the *Zillá Magistrate*.

The Zillá Magistrate being specially mentioned as the authority by whom such penalty is to be enforced, we are of opinion that the case falls within the exception contained in Sec. 21 of the Criminal Procedure Code, and that no other authority has jurisdiction.

The conviction and sentence in this case are, accordingly, reversed, and the penalty is ordered to be returned.

MELVILL, J., concurred.

Conviction and sentence reversed.

REG. v. PARSHRA'M KESHAV.

1870.
July 28.

Crim. Proc. Code, Sec. 167—*Sanction for Prosecution.*

Sec. 167 of the Code of Criminal Procedure requires that sanction to prosecutions therein mentioned shall be given before any such prosecution is commenced; and, until the sanction is obtained, the tribunal by which the offence is triable has no jurisdiction, and a conviction founded on evidence taken without such sanction would be bad.

Where a complaint charged a person who was one of the public servants mentioned in Sec. 167 of the Criminal Procedure Code with committing acts which if committed by a private individual would have constituted the offence of extortion:

It was held that it was not illegal to treat the charge as a charge of extortion, and to proceed with the trial without sanction for the prosecution.

THE accused, Parshrám Keshav, a First Kárkún, and Subordinate Magistrate, Second Class, at Pachorá, was convicted of extortion, and sentenced to one year's rigorous imprisonment, by J. McLeod Campbell, Magistrate F. P. in the Khándesh district. In appeal, the Session Judge reversed the conviction and sentence, on the ground that the sanction of the Magistrate of the District for prosecuting the accused, though dated prior to the framing of the charge against him, was filed in the case subsequently. The Magistrate F. P. addressed a letter to the Magistrate of the District representing that, following the circular of the Calcutta High Court No. 20 of 1864, quoted by Prinsep and Currie in their editions of the Code of Criminal Procedure under Sec. 167, he did not think it necessary to obtain any sanction for prosecution. The District Magistrate forwarded that letter to the High Court, and requested them to send for the record and proceedings and review the case.

The record and proceedings having been sent for and reviewed by GIBBS and MELVILL, JJ., the following judgment of the court was delivered by

MELVILL, J.:—The first question which we have to decide is whether a conviction by a Magistrate for any of the offences to which Sec. 167 of the Criminal Procedure Code refers is vitiated by the circumstance that the necessary

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sanction for the prosecution was not received until an advanced period of the trial.

We agree with the Session Judge that Sec. 167 of the Criminal Procedure Code requires that sanction to certain prosecutions should be given before such prosecution is commenced. A Magistrate may in such a case receive a complaint of the nature mentioned against a public servant, and, if he think right, may make a preliminary inquiry into the truth of the complaint, under Sec. 180 of the Criminal Procedure Code; but he is not authorised to cause the attendance of the accused, or to take any evidence against him, until he has obtained the necessary sanction. Until the sanction is obtained the Magistrate has no jurisdiction, and a conviction founded on evidence taken without jurisdiction would be bad. This view does not conflict with that taken by this court in the case of *Reg.* v. *Jivan Vásudev,* to which the Magistrate of the District has referred. That was a case tried by a Court of Session, and this court held that the trial might be proceeded with, though the sanction of Government to the prosecution had not been given until after the committal of the accused. The Magistrate's proceedings had been irregular, but the prosecution had been duly authorised before the trial commenced, and it was held that under these circumstances the irregularity of the preliminary inquiry did not prevent the Court of Session from trying the case. But it by no means follows from this that, if the offence in that case had been within the cognisance of the Magistrate, and if the Magistrate had convicted the accused, instead of committing him for trial, this court would have upheld a conviction founded on evidence which had been taken without jurisdiction.

The next question on which the Session Judge and the Magistrate are at issue is whether a sanction was necessary at all in this case. The accused was convicted, under Sec. 384 of the Indian Penal Code, of extortion. The trying

Magistrate has relied, in support of his opinion that no sanction was necessary, upon a note by Mr. Prinsep to Sec. 167 of the Criminal Procedure Code, in which it is stated that the Calcutta High Court has declared that this section relates to offences specified in Chap. IX. of the Indian Penal Code, and to no other. If the Circular referred to be correctly quoted, we cannot fully concur in it, for it seems to us impossible to hold that Sec. 167 does not relate to such offences as those specified in Secs. 217 to 223 of the Indian Penal Code, which are not contained in Chap. IX. of the Code. But we agree with the view which was no doubt intended to be expressed in the Circular, namely, that Sec. 167 relates only to those acts and omissions which are declared in the Penal Code to be offences when they are committed by a public servant.

In the present case the trying Magistrate might have treated the complaint as a charge of an offence punishable under Sec. 161 of the Indian Penal Code, and it would perhaps have been more judicious to have done so; and in that case the sanction of the Magistrate of the District would have been necessary before the prosecution could be commenced. But the complaint certainly did allege acts which if committed by a private individual would have constituted the offence of extortion; and, therefore, we cannot say that the Magistrate acted illegally in treating the charge as a charge of extortion, and in proceeding with the trial without the sanction of the Magistrate of the District.

On this ground we think that the finding of the Session Judge must be overruled; and we, accordingly, reverse it, and direct him to hear and decide the appeal on its merits.

Session Judge's order reversed, and appeal ordered to be reheard.

1870.
August 11.

REG. v. MALHA'R RA'MCHANDRA

False Report—Sanction for Prosecution by Mámlatdár—Kulkarni—Public Servant—Crim. Proc. Code, Sec. 167—Ind. Pen. Code, Sec. 218.

The sanction for the prosecution of a Kulkarni for making a false report as a public servant, required by Sec. 167 of the Code of Criminal Procedure, may be given by the Mámlatdár or by the Pátíl to whom such Kulkarni is subordinate. The sanction of the Collector is not necessary for that purpose.

A Kulkarni who makes a false report with reference to an offence committed in his village with intent, &c. is punishable under Sec. 218 of the Indian Penal Code.

THE record in this case was called for by the High Court, upon a review of the monthly Criminal Return of the Honorable G. A. Hobart, Session Judge of Khándesh, under Sec. 403 of the Code of Criminal Procedure.

Four men were charged before the Police Pátíl of Boris, in the táluká of Dhuliá, with misappropriating a sum of money belonging to one Kunashee. The accused, who was Kulkarni of the village, was directed to write a report of the case, which he, accordingly, did. Subsequently he wrote another report, which was untrue, and calculated to make the charge appear untrue, and to save the offenders from legal punishment.

The Subordinate Magistrate of the First Class at Dhuliá, who was also Mámlatdár of that place, committed the accused for trial, under Sec. 218 of the Indian Penal Code, on the charge that "he, on the 3rd of April 1870, at Boris, being a public servant, and being, as such public servant, charged with the preparation of a record respecting an offence alleged to have been committed by Bárkiá valad Náráyaṇ and three others, framed the record in a manner which he knew to be incorrect, with intent thereby to save the said Bárkiá and others from legal punishment."

The accused was tried at the Criminal Sessions held at Dhuliá by Satyendra Náth Tagore, Assistant Session Judge in the Khándesh district, and was convicted and sentenced to six months' imprisonment.

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v.
MALHA'R RA'MCHANDRA.

The accused appealed to the Court of the Session Judge, where the conviction and sentence by the Assistant Judge were reversed. The following is an extract from the judgment of the Session Judge :—

"It is unnecessary to analyse the evidence in this case, for there is, among the other objections taken in appeal, this objection, which I think is a good one, namely, that the accused is a Kulkarṇi, and that, to legalise the present charge against him, it was necessary, under Sec. 167 of the Code of Criminal Procedure, that there should have been a sanction for the prosecution such as is prescribed in that section, and that this sanction is wanting.

"It appears that the charge is against the Kulkarṇi as such, for it was his duty to prepare the report; and it appears that the accused is not removeable from office without the sanction of Government: Act XI. of 1843, Secs. 7 and 11. Unless the officer who committed the case for trial, namely, the Subordinate Magistrate of the First Class, who is also Mámlatdár of Dhuliá, had authority to sanction the prosecution, there was no proper sanction; for there is no other than is implied on the part of the Subordinate Magistrate, who is also Mámlatdár, investigating the case, and committing the accused to the Session Court for trial. But only the Collector, and perhaps his Assistants in charge of the tálukás within which the Kulkarṇis officiate, are the officers to whom Kulkarṇis are subordinate, *i. e.*, there is no officer of lower grade to whom they are subordinate. And the Mámlatdár is not empowered by the local Government within the meaning of the term 'empowered,' and he, therefore, could not sanction the prosecution."

The papers in this case were called for by the High Court, upon a review of the monthly Criminal Return of the Session Judge of Khándesh for May 1870, to determine the question (1) whether the sanction of the Collector was necessary for the prosecution, and (2) whether the prisoner was a public officer within the meaning of the Code, and (3) whether the writing of the report was his duty as such public servant.

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REG. v. MALHA'R RA'MCHANDRA.

The case was considered by GIBBS and MELVILL, JJ.

PER CURIAM:—It must be held that the Mámlatdár of the táluká sanctioned this prosecution, as he himself, in his capacity of Subordinate Magistrate, made the preliminary inquiry.

A Kulkarṇi is certainly subordinate to the Mámlatdár of the táluká. The very section of the Regulation (Sec. 26 of Reg. XVI. of 1827) which makes it the duty of the village accountant to furnish such reports as that which was the subject of this prosecution declares that "it shall be his duty to do so whenever called upon by the head of the village, or by the Native Revenue or Police Officer of the District." These words clearly imply subordination not only to the Mámlatdár, but to the Páṭíl.

It may well be that it is not desirable that the prosecution of hereditary officers, such as Kulkarṇis, should be sanctioned by officers who themselves hold such subordinate positions as those of Mámlatdár and Páṭíl. But the words of Sec. 167 of the Criminal Procedure Code are, "a charge of an offence punishable under the Indian Penal Code, of which any Judge, or any public servant not removable from his office without the sanction of the Government, is accused, as such Judge or public servant, shall not be entertained against such Judge or public servant except with the sanction of * * * some authority to which such Judge or public servant is subordinate, and whose power so to sanction or direct such prosecution the local Government shall not think fit to limit or reserve." As the local Government has not thought fit to limit the power of Mámlatdárs to sanction the prosecution of any officers subordinate to them, there was sufficient sanction in this case; and the Session Judge's order, reversing the conviction, on the ground that there was no sanction, must be set aside, and he must be directed to hear and decide the appeal on its merits.

Order reversed. Appeal directed to be heard on its merits.

NOTE.—The Court forwarded to Government an expression of their opinion in this case, in order that Government might, if it thought fit, make rules on the subject.

1870.
Sept. 8.

REG. v. MEHTARJI GOPA'LJI *et al.*

Review—Criminal Trial.

The Code of Criminal Procedure contains no provision for a review of an order passed in a criminal case.

THIS was an application to the High Court in the exercise of its extraordinary criminal jurisdiction.

On the 13th of November 1869, the petitioners, Mehtarji Gopálji and Bhujá valad Jairám, were tried for murder, and were, by the Session Judge at Ahmednagar, convicted and sentenced to transportation for life.

From the conviction and sentence a petition of appeal was presented to the High Court, when Shivshankar Govindrám, a Pleader of the Court, appeared for the petitioners. The petition was rejected, and the sentence confirmed, on the 19th of January 1870, by GIBBS and SARGENT, JJ.

The petitioners now applied for a review of that order, on the ground that the conviction and sentence were contrary to law and against the weight of evidence.

The petition came on for hearing this day, before GIBBS and MELVILL, JJ.

Vasantráv Bálmukund appeared for the petitioners.

GIBBS, J.:—The papers in this case were before the court on a former occasion, and the present applicants were then heard through a Pleader, when the conviction and sentence were affirmed. No provision is made in the Code of Criminal Procedure for the reviewing of orders passed in criminal cases, which, under Sec. 428, are final; and I have never known any case in which a review has been allowed under circumstances like the present. In a few cases, where the order of rejection had been made on the petition itself, prepared in the jail and forwarded by the jailor, without hearing a Pleader, this court has allowed a Pleader to move the court to call for the papers on proper grounds being shown. The order sought to be reviewed by this petition was passed by a

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Division Court after hearing the Pleader for the petitioners, and the grounds of review now sought to be brought forward are the same as those which were urged on the appeal. For these reasons we reject the application.

MELVILL, J., concurred.

Application rejected.

Sept. 22.

REG. v. CHA'NGIA' valad SHUMIA'.

Whipping—Conviction of Theft in a Dwelling-house—Previous Conviction of Theft—Act VI. of 1864, *Sec.* 3.

A prisoner convicted of "theft in a dwelling-house" who has previously been convicted of "simple theft" is not thereby rendered liable to whipping, under Act VI. of 1864, Sec. 3.

CASE referred by G. F. Sheppard, Magistrate of Thánáá, under Sec. 434 of the Code of Criminal Procedure, for the orders of the High Court:—

"The First Class Subordinate Magistrate of Murbár convicted one Chángiá valad Shumiá, under Sec. 380 of the Indian Penal Code, of the offence of "theft in a dwelling-house," and sentenced him to fifteen days' imprisonment and to receive in addition twenty lashes.

"On referring to the record of a previous conviction against the prisoner, I find that he was formerly convicted of simple theft, being an offence distinct from that with which he has been now charged.

"I am, therefore, of opinion that, under the provisions of Sec. 3 of Act VI. of 1864, the sentence of whipping is illegal, and, accordingly, refer the proceedings for the orders of the High Court."

PER CURIAM (WESTROPP, C.J., GIBBS and LLOYD, JJ.):—The Court annuls the sentence of whipping passed upon Chángiá valad Shumiá as illegal.

The offence, under Sec. 380 of the Indian Penal Code, of theft in a dwelling-house, is a distinct offence from that of theft under Sec. 378, and is not included under it.

Order accordingly.

REG. v. MANGLA' BHULIA' *et al.*

1870. Sept. 29.

Case submitted to District Magistrate—Reference to Magistrate F. P.—Crim. Proc. Code, Sec. 276.

It is competent for the Magistrate of a District to refer for trial to a Full Power Magistrate a case submitted, under Sec. 276 of the Code of Criminal Procedure, to such Magistrate of the District by a Subordinate Magistrate.

MANGLA' BHULIA' and Dattá Pirú, who were respectively tindal and sailor on board a vessel in which cotton was shipped from Bháunagar, were charged with having stolen about four *mans* of cotton from the said vessel. On being apprehended by the police, they were sent to the Subordinate Magistrate of Balsád, charged under Sec. 405 of the Indian Penal Code. The Subordinate Magistrate, considering that the case properly fell under Sec. 407 of the Penal Code forwarded it to the District Magistrate of Súrat. The District Magistrate, under Sec. 276 of the Code of Criminal Procedure, referred the case for trial to W. Porteous, Full Power Magistrate in the Súrat District, who thereupon tried the prisoners, and found that Manglá Bhuliá and Dattá Pirú were guilty of the offence of stealing cotton from a vessel used for the custody of property (under Sec. 380 of the Indian Penal Code), and sentenced Manglá Bhuliá to nine months' rigorous imprisonment, and Dattá Pirú to six months' rigorous imprisonment.

Upon a review by the High Court of the criminal returns of the Full Power Magistrate in the Súrat District, the record and proceedings in the case were called for, to determine whether a District Magistrate can refer a case submitted to him by a Subordinate Magistrate, under Sec. 276 of the Code of Criminal Procedure.

PER CURIAM (GIBBS and MELVILL, JJ.):—The words of Sec. 276 are—"If in the course of a trial before a Subordinate Magistrate, the evidence appears to him to warrant a presumption that the accused person has been guilty of an offence which such Magistrate is not competent to try, or for which he is not competent to commit the accused

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person for trial, he shall stay proceedings, and submit the case to the Magistrate to whom he is subordinate, or to such other Magistrate having jurisdiction as the Magistrate of the District may direct. The Magistrate to whom the case is submitted shall either try the case himself, or refer it to any officer subordinate to him having jurisdiction, or he may commit the accused person for trial."

It appears clear from this section that the Magistrate of the District may refer to a Full Power Magistrate a case submitted under Sec. 276 of the Code of Criminal Procedure. The Court, therefore, sees no grounds for interference, and directs that the records and proceedings be returned.

REG. v. KUSA' valad LAKSHMAN.

Nov. 17.

Juvenile Offender—Whipping—Act VI. of 1864, Sec. 3.

Section 3 of Act VI. of 1864 (the Whipping Act) applies to juvenile as well as to adult offenders.

That section does not apply to cases in which the second conviction is for an offence committed previously to the first conviction.

THIS was a case referred by A. C. Watt, Acting Session Judge of Puṇá, for the orders of the High Court.

The prisoner Kusá and a boy named Káshirám, aged respectively fifteen and twelve years, were tried for theft by H. F. Aston, 2nd Class Subordinate Magistrate at Puṇá, and were convicted of that offence. As the Magistrate considered their offence to call for a severer punishment than he was competent to adjudge, he submitted the proceedings to the Magistrate of the District.

Upon a review of the proceedings in the case, and the record of a previous conviction for theft committed by the same persons a few days before the one under inquiry, the District Magistrate considered that the younger boy, Káshirám, had been tempted and led away by the older, Kusá. As Káshirám had been already ordered in the former case to be bound as an apprentice in the David Sassoon Reformatory, the District Magistrate reversed the conviction in his case,

but sentenced Kusá to receive twenty stripes with a rattan, and to be confined for six months in the Puṇá Jail Reformatory on the expiration of the sentence awarded for the previous conviction.

The Acting Session Judge, in referring the case to the High Court, stated that, in his opinion, Sec. 3 of Act VI. of 1864 did not apply to juvenile offenders, to whom the section applicable was Sec. 5, under which a double punishment could not be inflicted upon a juvenile offender, even though he might have been previously convicted of the same offence. He thought that the case of *Reg.* v. *Abdool Khitmutgar* (*a*), quoted at p. 788 of the Indian Digest, was applicable.

The reference was considered by GIBBS and MELVILL, JJ.

PER CURIAM :—The Court does not agree with the Acting Session Judge that Sec. 3 of Act VI. of 1864 is inapplicable to juvenile offenders.

But another question arises, and that is, whether the provisions of Sec. 3 are applicable when the second conviction is for an offence *committed* previously to the first conviction. This question has already been decided by this court in the negative : *Reg.* v. *Surya* (*b*). The object of the law is to inflict whipping, in addition to the other punishment, upon those persons only who, after completing a previous sentence, and after having a *locus penitentiæ* afforded to them, again commit the same offence, and thereby show that they are not to be deterred by a sentence of imprisonment only.

The Court, therefore, reverses so much of the sentence as directs the prisoner to receive twenty stripes with a rattan.

The Court would observe that the reason assigned by the Magistrate of the District for reversing the conviction of Káshirám, namely, that he was tempted and led away by the other prisoner, was not legally sufficient, though it might have justified the Magistrate in passing a lenient sentence.

Sentence of whipping reversed.

(*a*) Calc. W. Rep., Special Vol. 1864, Cr. Ca. 38.
(*b*) 3 Bom. H. C. Rep., Cr. Ca. 38.

1870.
Nov. 24.

REG. v. KA'LA' bin HARI GAMA *et al.*

Code of Criminal Procedure, Sec. 435.

Where a Magistrate of the District thinks that in any case tried by a Magistrate subordinate to him a failure of justice has occurred, in consequence of the latter not committing the accused for trial to the Court of Session, he should refer the case, with an expression of his opinion, to the Session Court, which has power, under Sec. 435 of the Code of Criminal Procedure, to direct a commitment to the Session Court for trial.

Sec. 435 having been altered by Act VIII. of 1869, it is no longer necessary to refer such cases to the High Court, as required by the Court's ruling in *Reg.* v. *Chanviráyá bin Chanbasáyá* (*a*).

THIS was a reference from J. R. Arthur, Magistrate of the District of Sátárá. The prisoners were tried by the Subordinate Magistrate of Karád, for the offence of using criminal force, and were acquitted. The District Magistrate, on a review of the proceedings of his subordinate, was of opinion that there was sufficient evidence in the case to secure a conviction of the accused of the offence of rape if they had been put on their trial before the Court of Session. He also stated that since the trial by the Subordinate Magistrate other evidence had been found. He, accordingly, requested the instructions of the High Court.

The reference was considered by GIBBS and MELVILL, JJ.

PER CURIAM :—The Magistrate should refer this case, with an expression of his opinion, to the Session Court, which has power, under Sec. 435 of the Code of Criminal Procedure, to direct a commitment to the Session Court for trial.

Sec. 435 having been altered by Act VIII. of 1869, it is no longer necessary to refer such cases to the High Court, as required by the Court's ruling in *Reg.* v. *Chanviráyá bin Chanbasáyá* (*ubi suprà*).

Order accordingly.

(*a*) 5 Bom. H. C. Rep., Cr. Ca. 65.

REG. v. SHIVBASA'PA'.

1870.
Nov. 24.

Crim. Proc. Code, Secs. 404 *and* 434—*Compensation—Session Judge's Power to call for the Record and Proceedings of a Magistrate F. P.*

An award of compensation to the widow of a person who died in consequence of a fall into a pit, negligently dug by the accused, from the fine imposed on the latter, is illegal.

A Magistrate F. P. is not immediately subordinate to the Session Court, and, therefore, a Session Judge has no concurrent jurisdiction with the Magistrate of the District, under Sec. 434 of the Code of Criminal Procedure. His proper course, if he thinks that an illegal sentence or order has been passed by a Magistrate F. P., is to make a report to the High Court, which will then, if it thinks fit, call for the proceedings, under Sec. 404.

THE proceedings in this case were referred by C. F. H. Shaw, Session Judge of the District of Belgáun, under Sec. 434 of the Code of Criminal Procedure, for the orders of the High Court. The prisoner was convicted, under Sec. 283 of the Indian Penal Code, of having caused the death of two persons, by omitting to take order with a grain-pit in his possession, and was sentenced to pay a fine of Rs. 100, to be levied, in case of non-payment, by distraint, Rs. 50 of which were directed to be paid to the widow of one of the deceased, as compensation for the injury she had received. The Session Judge, in referring the case, stated: "It is in evidence that one Shivbasápá opened a grain-pit on the road in front of his house, and in immediate proximity to other houses in the village of Kunmuchunhal, and, failing to protect the mouth of the pit, a child of one Revarshidá fell into the pit. Seeing what had happened, one Chanápá went to his assistance, but both were overpowered by noxious gases, and died then and there. The Magistrate F. P. has properly punished Shivbasápá for his neglect of a public duty, and has awarded compensation to the widow of Chanápá from the fine imposed.

"Act XIII. of 1855, modelled upon Lord Campbell's Act, specially provides for compensation to the heirs of persons killed by actionable wrong, and the Calcutta High Court, in *Reg.* v. *Lall Singh* (*a*), has distinctly ruled that Sec. 44 of the

(*a*) 10 Calc. W. Rep., Cr. R. 39.

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REG. v. SHIVBASA'PA'.

Criminal Procedure Code does not apply to cases like the present.

"The order of the Magistrate F. P. awarding compensation of Rs. 50 to be paid to the widow of Chanápá is illegal, and the proceedings of the Magistrate F. P. are submitted for the orders of the High Court.

"Under Secs. 23 G and 434 of the Criminal Procedure, it was competent to the Magistrate of the District to refer the case for the orders of the Honourable the Judges of Her Majesty's High Court, but, to avoid delay, and as the Judge has a concurrent jurisdiction, present action has been taken."

The reference was considered by GIBBS and MELVILL, JJ.

PER CURIAM:—The Court considers that the Session Judge's view is correct, and reverses the order awarding compensation to the widow of the deceased.

A Magistrate F. P. is not immediately subordinate to the Session Court, and, therefore, the Session Judge is in error in supposing that he has concurrent jurisdiction with the Magistrate of the District, under Sec. 434 of the Code of Criminal Procedure. His proper course, if he think that an illegal sentence or order has been passed by a Magistrate F. P., is, not to call for the proceedings under Sec. 434, but to report to the High Court, which will then call for the proceedings under Sec. 404.

Order of compensation reversed.

REG. v. HA'U NA'GJI *et al.*

Dec. 1.

Nuisance—Gambling—Common Gaming-house—Bombay Act III. of 1866, Sec. 14—Ind. Pen. Code, Sec. 268.

A common gaming-house is one which is kept or used for profit or gain, and may constitute a public nuisance; but it cannot be held, in the absence of evidence of any actual annoyance to the public, that every person who admits gamblers into his house, and all persons who game therein, are guilty of a public nuisance within the meaning of Sec. 268 of the Indian Penal Code.

THE accused were convicted by the 1st Class Subordinate Magistrate of Dhandhuká, under Sec. 291 of the Indian

Penal Code, of the offence of continuing a public nuisance, by gambling in a house belonging to some of them, after injunction not to continue such nuisance. They appealed to the District Magistrate, who confirmed the convictions. Thereupon an application for the exercise of the extraordinary jurisdiction was made to the High Court.

The application was heard by GIBBS and MELVILL, JJ.

Nágindás Tulsidás for the appellants.

Dhirajlál Mathurádás, Government Pleader, for the Crown.

The following judgment, from which the facts sufficiently appear, was delivered by the Court:—

In England it has been held to be a nuisance to keep a common gaming-house: *Rex.* v. *Rogier and another* (*a*); *Rex* v. *Taylor* (*b*). Looking to the form of the indictments in these cases, which charge the accused with keeping a certain common gaming-house for "lucre and gain," we think that the term "common gaming-house" in England is understood in the same sense as it is defined in Sec. 14 of Bombay Act III. of 1866. That section is as follows:—

"The words 'common gaming-house,' shall be taken to mean any house, room, or place in which cards, dice, tables, or other instruments of gaming are kept or used for the profit or gain of the person owning or keeping such house, room, or place, whether by way of charge for the use of the instruments of gaming, or of the house, room, or place, or otherwise howsoever."

A similar definition is contained in Sec. 1, Act III. of 1867.

There is nothing to show that the house of the accused Nos. 3 and 5 in this case was a gaming-house kept by them for profit or gain; and, in the absence of evidence on this point, it cannot be held to be a common gaming-house. We think, therefore, that the conviction cannot be sustained on the ground that all gaming-houses are nuisances in the eye of the law. On the other hand, there appears to be no evidence that either the keepers or frequenters of this

(*a*) 1 B. & C. 272. (*b*) 3 B. & C. 502.

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particular house acted in such a manner as to cause a public nuisance within the meaning of Sec. 268 of the Penal Code. Although, following the English decisions, we might perhaps hold that a common gaming-house, to which every one who chooses to pay is able to go, is necessarily a nuisance, and that no evidence of any actual annoyance to the public is in such a case required, yet we cannot, without such evidence, hold that every person who admits gamblers into his house, and every person who games therein, is guilty of a public nuisance.

Convictions and Sentences reversed.

Dec 1.

REG. v. SANGA'PA' bin BASHIA'PA'.

Indian Income Tax Act—General Clauses Act—Imprisonment in default of Payment of Fine.

The Indian Income Tax Act (Act IX. of 1869, supplemented by Act XXIII. of 1869) having been passed subsequently to the General Clauses Act (No. I. of 1868), Sec. 5 of the latter authorises the award of imprisonment in default of payment of the fine imposed under Sec. 25 of the former.

THIS was a case referred for the orders of the High Court by J. Elphinston, Magistrate of the District of Kánará. The accused, having failed to pay the additional tax imposed upon him under the supplementary Income Tax Act (No. XXIII. of 1869,) was sentenced, on conviction, by the First Class Subordinate Magistrate of Kumptá, to pay a fine of Rs. 6, or in default to suffer fifteen days' simple imprisonment. In referring the case, the District Magistrate stated that "neither of the Income Tax Acts (IX. and XXIII. of 1869) prescribes imprisonment for default of payment of a fine, Sec. 26 referring to recoveries only, and that the High Court held the same view in 1868, in the case of *Reg.* v. *Chenáppá valad Nágáppá* (*a*). That was a case disposed of under Sec. 15 of the License Tax Act (XXI. of 1867), as amended by Sec. 3 of Act XXIX. of 1867; but the 25th section of Act IX. of 1869, under which Sangápá was fined, would be found to be a corresponding one to Sec. 15 of Act XXI. of

(*a*) 5 Bom. H. C. Rep., Cr. Ca. 44.

1867, as amended by Act XXIX. of 1867; and Sec. 26 of Act IX. of 1869 was an exact copy of Sec. 17 of Act XXI. of 1867, under which the High Court ruled that the trying Magistrate had, under the Act, no power to award imprisonment in default of payment of a fine."

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REG. v. SANGA'PA' BASHIA'PA'.

The reference was heard by GIBBS and MELVILL, JJ.

PER CURIAM:—The Indian Income Tax having been passed subsequently to the General Clauses Act (No. I. of 1868), Sec. 5 of the latter Act disposes of the Magistrate's objection.

The record and proceedings in the case to be returned.

Papers returned.

Sec. 5 of the General Clauses Act runs as follows:—

"The provisions of Sections sixty-three to seventy, both inclusive, of the Indian Penal Code, and of Section sixty-one of the Code of Criminal Procedure, shall apply to all fines imposed under the authority of any Act hereafter to be passed, unless such Act shall contain an express provision to the contrary."

REG. v. REAY.

Dec. 16.

Privy Council—Appeals in Criminal Trials—Referred Case—Criminal Proc. Code, Sec. 404—*Amended Letters Patent of* 1865, *Cl.* 41.

The High Court has no power, under Cl. 41 of the Amended Letters Patent of 1865, to grant leave to appeal to Her Majesty in Council from an order made or decision given in a criminal case referred by a Magistrate, under Sec. 404 of the Code of Criminal Procedure.

THE order of the High Court, made on the 21st of May 1870, annulling the conviction and sentence of Mr. Reay, and the proceedings in the case generally, will be found reported in the 7th volume of the Bombay High Court Reports, at p. 6 of the Crown Cases.

That order was made upon the proceedings in the case having been referred by the District Magistrate of Ahmedábád for the orders of the High Court, under Sec. 404 of the Code of Criminal Procedure.

A petition for leave to appeal from that order to Her Majesty in Council was presented by *Dhirajlál Mathurádás* (Government Prosecutor).

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The petition came on for hearing before WESTROPP, C. J., GIBBS and MELVILL, JJ., on the 9th of December 1870.

The Honorable A. R. Scoble (Acting Advocate General), in support of the petition:—Appeals to the Privy Council in criminal cases are regulated by Cl. 41 of the Amended Letters Patent of 1865. By that clause appeals are allowed "from any judgment, order, or sentence of the High Court in the exercise of original criminal jurisdiction, or in any criminal case where a point or points of law have been reserved for the opinion of the High Court, in manner hereinbefore provided, by any court which has exercised original jurisdiction, provided that the High Court shall declare that the case is a fit one for such appeal." The decision in *Reg.* v. *Reay* does not fall under the first part, but it is contended that it comes within the meaning of the latter portion of the clause, as being a decision on a point of law reserved for the opinion of the High Court. It is true the section is limited to those cases where a point or points of law have been reserved *in manner hereinbefore provided* by any court which has exercised original jurisdiction, and it may be said that the words "*in manner* hereinbefore provided" refer to Cl. 25, which, after declaring that "there shall be no appeal to the said High Court of Bombay from any sentence or order passed or made in any criminal trial before the court of original criminal jurisdiction which may be constituted by one or more Judges of the said High Court," proceeds to say that "it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court." The reference in *Reg.* v. *Reay* was made under Sec. 28 of the Charter, and the question, therefore, is whether the decision of the High Court upon a point of law referred to it by a Magistrate cannot be included under the comprehensive words of the latter portion of Sec. 41. The reference in *Reg.* v. *Reay* was on a point of law referred (if not reserved) for the opinion of the High Court by a court which had exercised criminal jurisdiction; for the Magistrate of Ahmedábád, in referring this point for the opinion of the High Court in a case tried before the Full

Power Magistrate then exercised criminal jurisdiction. The large words used in Sec. 41, "by *any court* which has exercised original criminal jurisdiction," liberally construed, warrant a construction by which appeals under Sec. 41 will lie in cases decided by the High Court under Sec. 28, as well as under Sec. 25. Even if the case does not fall within Sec. 41, I contend that unless the Charter in express terms takes away the right of appeal, that right does not cease to exist merely because in certain cases that Charter makes provision for appeals. This has been expressly affirmed to be so in the case of *The Falkland Islands Company* v. *The Queen* (*a*). The case of *Reg.* v. *A'lu Párú* (*b*), as well as the case of *The Queen* v. *Eduljee Byramjee* (*c*), may be distinguished from the present, as it was there decided that where leave to appeal had been applied for, and this Court *had refused* its permission, the Privy Council could not admit the appeal. Under the old Charter of the Supreme Court, this Court had absolute discretion in the matter, and the order of rejection was held in those cases to be final. In the case of *The Queen* v. *Joykissen Mookerjee* (*d*) the Privy Council implicitly assert the existence of a prerogative right of appeal in matters of criminal jurisdiction: "They think it will suffice for the purpose of this case to assume that it does exist" (p. 191). The fact, no doubt, is, as remarked in the judgment of Dr. Lushington, that "in no instance whatever * * * has any attempt ever been made to apply to Her Majesty for leave to appeal in a criminal case." Though in *Reg.* v. *Joykissen Mookerjee* the Privy Council declined, from a fear of the consequences, to advise Her Majesty to grant an appeal, in a purely criminal case, there is a class of quasi-criminal cases in which, by reason of the important issues involved, they have declared that they would admit an appeal: *The Attorney General of N. S. Wales* v. *Bertrand* (*e*). The present case is of this kind, as the decision of this Court will have the effect of invalidating many Acts affecting Europeans in all the Presidencies. The point here

(*a*) 1 Moo. P. C. C., N. S., 299. (*b*) 3 Moo. Ind. App. 488.
(*c*) *Ibid.* 468. (*d*) 9 *Ibid.* 168. (*e*) Law Rep. 1 P. C. Ca. 520.

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is one exclusively of law, and though, under Sec. 407 of Act XXV. of 1861, no appeal lies from a judgment of acquittal, the Privy Council has admitted appeals even in cases of acquittal where a determination of law led to the acquittal, as in this case: *The Queen* v. *Murphy* (*f*).

Cur. adv. vult.

Dec. 16. The judgment of the Court was pronounced this day by

WESTROPP, C.J. :—In the case of *Reg* v. *Reay* (reported in 7 Bom. H. C. Rep., Cr. Ca. 6) the Advocate General, on Wednesday last, applied, on behalf of the Bombay Government, to my brothers Gibbs and Melvill and myself, for leave, under the 41st section of the Charter of this Court dated the 28th of December 1865, to appeal to Her Majesty in Council against the decision of Mr. Justice Gibbs and Sir Charles Sargent (now absent in Europe) pronounced on the 21st of May in the present year. That decision was not made in the exercise of original criminal jurisdiction, nor as we think, in any criminal case where any point or points of law have, within the meaning of that section, been reserved for the opinion of the High Court in manner thereinbefore (*i. e.*, in that Charter) provided. The previous provisions to which the 41st section seems to us to refer, are those contained in the 25th and 26th sections, which relate to the reservation of points of law for argument before the High Court as a court of original criminal jurisdiction, and not to the provisions contained in the 27th and 28th sections, in which the High Court is regarded as a court of appeal, reference, and revision. We, therefore, are of opinion that we have no authority under the Charter to give permission to the Crown to appeal to Her Majesty in Council against a decision made, as that of Mr. Justice Gibbs and Sir C. Sargent, upon a case decided originally by a Full Power Magistrate, and referred to the High Court by the District Magistrate. Had we the power, we should not hesitate to exercise it (upon the condition of the Crown providing eminent counsel to argue the case before the Judicial Com-

(*f*) Law Rep. 2 P. C. Ca. 535.

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mittee of the Privy Council, as well on behalf of the defence as on behalf of the prosecution, for it could not be expected that Lieutenant Reay should do so, the fine having been only one rupee), the question as to the scope of the powers of the Bombay Legislature involved in this case being of considerable importance, and one which it is desirable should be brought before the tribunal of final resort. In saying thus much, my brother Gibbs is not to be understood as in anywise departing from the judgment which he has given, and my brother Melvill and myself are not to be taken as expressing any opinion as to whether or not the question on which the appeal is sought, has been rightly decided. In fact we have not formed any opinion upon that point.

We say nothing as to the probable result of an application made directly to Her Majesty in Council for leave to appeal. It is sufficient for us to state our opinion that we do not think that in a case so circumstanced as this, howsoever willing we may be to grant such permission, we have any power to do so. The motion of the learned Advocate General must, therefore, stand refused.

Petition rejected.

REG. v. BA'PU PARBAT.

June 23.

Practice—Charge.

Proper course laid down for a Judge to adopt when the facts proved do not support the charge as laid.

BA'PU PARBAT was committed by the Magistrate of Kheḍá, on a charge of adultery, alleged to have been committed on or about the 10th of December 1869, for trial before the Court of Session at Ahmedábád.

E. T. Candy, the Acting Assistant Judge who tried the prisoner, found that the overt act of adultery as alleged in the charge could not be proved to have been committed on the 10th of December 1869, but, being of opinion that there was reason to believe that *after* the 10th of December 1869 the accused lived with the wife of the complainant in adultery, the Assistant Judge, though he formally acquitted the accused,

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ordered a new trial on a charge of having committed adultery within four months of the date alleged. The Assistant Judge held that the words "or about" were merely formal, and that the real charge was that the accused had committed an overt act of adultery *on* the 10th of December 1869.

W. M. Coghlan, Session Judge at Ahmedábád, referred the proceedings to the High Court, under Sec. 434 of the Code of Criminal Procedure, as he thought that the order directing a new trial was illegal under the circumstances. He considered the words "or about" in the charge as material, and not merely formal, and that the widest reasonable limits must be assigned to them.

The Court (GIBBS and LLOYD, JJ.,) disposed of the reference on this day.

PER CURIAM:—That the order directing the new trial under the circumstances was illegal. The trying authority, when he considered the facts did not support the charge on which the prisoner was tried, might have altered it, but had no power to order the Magistrate to recommit the accused.

June 28.

REG. v. PA'RVATI.

Practice—Acquittal—Recording Opinion of Assessors.

When a judgment of acquittal is recorded, it is not necessary to record the opinions of the Assessors.

THIS was a point of law referred, under Sec. 404 of the Code of Criminal Procedure, for the opinion of the High Court, by W. M. Coghlan, Acting Session Judge of Thán.á.

It arose in the case of *Reg.* v. *Párvati* and another, tried at the Kulábá sessions, and was whether, when a judgment of acquittal is recorded under Sec. 372 of the Code of Criminal Procedure, it is proper to take and record the opinions of the Assessors. The Acting Session Judge was of opinion that it was not necessary to do so.

PER CURIAM (in chambers):—When a judgment of acquittal is recorded under Sec. 372 of the Code of Criminal Procedure, it is not necessary to take and record the opinions of the Assessors.

REG. v. GAZI kom A'BA' DORE.

1870. July 28.

Bailiff—Execution of Decree of Civil Court—Breaking open of Doors.

If a bailiff break the doors of a third person, in order to execute a decree against a judgment-debtor, he is a trespasser if it turn out that the person or goods of the debtor are not in the house; and under such circumstances the owner of the house does not, by obstructing the bailiff, render himself punishable under Sec. 183 or Sec. 186 of the Indian Penal Code.

THE accused was convicted of offering resistance to the taking of property by the lawful authority of a public servant, under Sec. 183 of the Indian Penal Code, and sentenced to pay a fine of Rs. 10.

The case was reviewed by GIBBS and MELVILL, JJ. The judgment of the court was delivered by

MELVILL, J.:—We have called for the proceedings in this case, on a review of the Magistrate's calendar, to consider the legality of the conviction.

The facts appear to be as follows:—A Kárkun of the Subordinate Civil Court of Pátas was sent to execute a decree for money obtained against one Máhádu, the father of the accused, Gazi. Máhádu and Gazi lived in separate houses. The creditor told the Kárkun that he believed that some of Máhádu's property was concealed in Gazi's house, and desired him to search it and to attach any property which might be found. What followed is thus related by the Kárkun:—"The door was locked, and I was going to break it open. Gazi came up and caught hold of the lock, and would not let me break it open; so I returned, and went on other business. The accused said the house and property were hers, and she would not allow the lock to be broken or the property taken. I did not go away because I believed her, but because she prevented me. I explained to the accused that she was committing an offence, and if the property was hers she must complain."

The finding of the Magistrate F. P. is as follows:—"There appears to be reason for the Kárkun believing that Máhádu kept some of his property in his daughter's house. He did

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not offer to confiscate the house, but only some property which he supposed to be in it, and he was clearly entitled to satisfy himself on that point. If it can be shown that Máhádu wilfully concealed the property, he can be otherwise proceeded against. In the meanwhile Gazi kom A'bá is clearly guilty of an offence under Sec. 183 of the Indian Penal Code, and the Court sentences her to pay a fine of ten rupees, or in default to undergo fifteen days' simple imprisonment."

The English law on the subject of the right of the Sheriff to break doors is laid down in *Semayne's* case (*a*). In that case the following points were resolved:—

(1) That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and, therefore, if thieves come to a man's house to rob him or murder, and the owner or his servants kill any of the thieves in defence of himself or his house, it is not felony, and he shall lose nothing.

(2) When any house is recovered by any real action, the Sheriff may break the house and deliver the seisin or possession to the demandant or plaintiff, for the words of the writ are *habere facias seisinam* or *possessionem*, &c.; and after judgment it is not the house in right, and judgment of law, of the tenant or defendant.

(3) In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it he ought to signify the cause of his coming and to make request to open the doors.

(4) In all cases when the door is open, the Sheriff may enter the house and do execution at the suit of any subject, either of the body or of the goods. But it is not lawful for the Sheriff (on request made and denial) at the suit of a common person to break the defendant's house &c. to execute any process at the suit of any subject.

(*a*) 1 Smith's L. Ca., 4th ed., 73.

(5) It was resolved that the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought or conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and, therefore, in such cases, after denial or request made, the Sheriff may break the house.

As regards the first four of these points, there is little doubt that the law laid down in them is in accordance with the law in force in India. The provisions of the first are analogous to the provisions of the Indian Penal Code regarding the right of private defence. The second may be compared with Sec. 223 of the Civil Procedure Code, which authorises the Sheriff, in executing a decree for the recovery of a house, to remove any person who may refuse to vacate the same,—an authority which would probably be held to include the right to break the door of the house. The third point corresponds with Secs. 94 and 123 of the Code of Criminal Procedure. As to the fourth point, it may be remarked that the question of the right to break a debtor's house has never come before this court, but the Calcutta High Court have decided that no such right exists: *The Queen* v. *J. MacQueen* (*b*).

The question involved in the fifth point is the one which arises in the present case, namely, the right of a bailiff to break open the house of a third person in order to attach goods belonging to a judgment-debtor. As we have heard no argument, we should be unwilling to decide this question, unless it is necessary for the disposal of the case; and it does not appear to us that it is necessary, since we think that, even if the provisions of the English law were applied, the conviction would still not be sustainable. For, although it was laid down in *Semayne's* case that the Sheriff may justify (after request made) the breaking open the doors of a third

(*b*) 3 Rev. Crim. and Civ. Rep., Cr. 8.

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person's house, in order to execute the process of the law upon the defendant or his property, removed thither in order to avoid an execution, still he does so at his peril; for if it turn out that the defendant was not in the house or had no property there, he is a trespasser: *Johnson* v. *Leigh* (*c*), *Ratcliffe* v. *Burton* (*d*). And this doctrine has been carried still further: for it has been thought that the Sheriff cannot, even though he may have grounds for suspicion, justify entering the dwelling-house of a third person, although he break no door, unless it prove in the event that the defendant or his goods were actually therein: *Cooke* v. *Birt* (*e*). Now in the present case there is no evidence whatever that there were any goods belonging to the defendant in the house of the accused Gazi; and in the absence of evidence the presumption must be in her favour that there were no such goods. As there was no such property in the house, Gazi did not offer any resistance to the taking of any property by the lawful authority of a public servant, which is the offence of which she has been convicted, under Sec. 183 of the Indian Penal Code; nor could she be convicted under what would appear to be a more appropriate section, namely, Sec. 186, for voluntarily obstructing a public servant in the discharge of his public functions; for the bailiff would have been exceeding his functions if he had done that which Gazi prevented him from doing.

On this ground we reverse the conviction and sentence, and order that the fine, if paid, be returned.

Conviction and sentence reversed.

(*c*) 1 Marsh. 565. (*d*) 3 B. & P. 229. (*e*) 5 Taunt. 769.

1870.
Aug. 8.

REG. v. LA'DU, daughter of Bhágu.

Bombay Act III. of 1867, *Secs.* 11 *and* 14—*Cantonment Magistrates—Fine, and Imprisonment in default of Payment—Simultaneous Sentence.*

In cases of convictions under Secs. 11 and 12 of the Military Cantonment Act (Bombay Act III. of 1867), a simultaneous sentence of fine and imprisonment in default of the payment of the fine is illegal. Imprisonment in default of payment of fine can only be awarded, under Sec. 14 of the Act, in the event of no property sufficient for the payment of the fine being found.

Reports of police or medical officers are not a sufficient sanction for prosecution under this Act. A complaint on oath or solemn affirmation is necessary.

THIS case was noticed by the Honorable Mr. Justice Lloyd in paragraph 67 of his Tour of Inspection in the Southern Maráṭhá Country in 1869-70. He said: "I observed that in a case decided by Mr. N. Byrámji, F. P., Magistrate of Belgám, a prostitute named Láḍu had been punished for not presenting herself for examination by the Civil Surgeon, in conformity with a rule framed under cl. 7, Sec. XI. of Bombay Act III. of 1867, on a note from that officer and without any evidence whatever." Upon this report the High Court sent for the record and proceedings, and called upon the Magistrate F. P. to explain his proceedings. The material portion of his explanation was as follows:—

"The undersigned begs to report that the accompanying report from the medical officer in charge of the Lock Hospital intimating the absence of the accused from examination on the appointed day, coupled with the report of the chief constable (also sent herewith), intimating due notice having been served on the accused of the date on which she was required to attend at the Hospital, was deemed sufficient warrant for his recording it as a formal complaint, and issuing the summons accordingly. .....The reason why no depositions on solemn affirmation were taken was that the accused pleaded guilty....."

The case was heard by GIBBS and MELVILL, JJ.

PER CURIAM:—No complaint having been made on oath

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or solemn affirmation, the conviction and sentence are reversed, and it is ordered that the fine, if paid, be restored.

A simultaneous sentence of imprisonment in default of payment of fine is in such cases illegal. Imprisonment in default can only be awarded under Sec. 14 (Bombay) Act III. of 1867, *i.e.*, in the event of no property sufficient for the payment of the fine being found.

Conviction and sentence reversed.

Sept. 22.

REG. v. UKHA' SA'V.

Police Pátil—Conviction—Bombay Act VIII. of 1867.

Conviction of a Police Pátíl for neglecting to report an encroachment made by the villagers on the public road reversed, as the circumstances of the case did not bring it within the provisions of Sec. 9 of Bombay Act VIII. of 1867.

UKHA' SA'V, Police Pátíl of Bhatgám, was charged with neglect of duty under Sec. 9 of the Bombay Village Police Act (VIII. of 1867), "in that he did not report an encroachment on the road caused by certain of the villagers having driven posts in front of their house and therewith enclosed a space for cattle." He was convicted by E. C. K. Ollivant, Full Power Magistrate in the Súrat district, and was sentenced to pay a fine of two months' emoluments.

Upon a review of the abstract of monthly criminal returns, the records and proceedings were called for by the High Court, under Sec. 404 of the Code of Criminal Procedure.

PER CURIAM (GIBBS and LLOYD, JJ.):—We are of opinion that a conviction under Sec. 9 of the Village Police Act can only be good if the duty neglected is one prescribed by or under the authority of the Act. The duty of reporting encroachments on the road does not appear to be a duty legally imposed on the Police Pátíl by the Act. Sec. 6 of Act VIII. of 1867 only requires the Police Pátíl to keep the Magistrate constantly informed as to the state of crime, and all matters connected with village police, the health and general condition of the community in his village.

The Court does not consider that the circumstances stated in the proceedings constituted an offence within the meaning of Sec. 9 of the Village Police Act. We, therefore, reverse the conviction and sentence, and order the fine, if paid, to be restored.

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REG. v. UKHA' SA'V.

Conviction and sentence reversed.

July 22, 30.

REG. v. ELMSTONE, WHITWELL, *et al.*

Jurisdiction—High Seas—Offence committed on the High Seas—Substantive Law applicable—Procedure—Penal Code—Abetment—Accessories—9 Geo. IV., c. 74, s. 7—30 & 31 Vict., c. 124, s. 11—Merchant Shipping Acts.

The substantive law applicable to a British-born subject tried in the High Court of Judicature at Bombay for destroying a British ship on the high seas, at a distance of more than three miles from the shores of British India, is the English law, and not the Penal Code, notwithstanding the provisions of Stat. 30 & 31 Vict., c. 124, s. 11.

The same substantive law is applicable to prisoners who conspire together in Bombay to destroy such ship on the high seas, and such ship is so destroyed in consequence.

The procedure applicable in such cases is the ordinary criminal procedure of the High Court.

The question whether the Indian Legislature has power to legislate with reference to offences committed on the high seas considered.

There is not any Act of the Indian Legislature now in force which provides for the offence of destroying a ship, when committed at a greater distance than three miles from the coast, or for the abetment in British India of such an offence so committed.

THE prisoners, Richard William Marks, Christopher Thomas Elmstone, Alfred Whitwell, and George Harriott, were at the Third Criminal Sessions of 1870, before BAYLEY, J., and a Special Jury, charged as follows:—

I. That he, the said Marks, British subject and seaman, on the 12th of June 1870, on board a British ship, the "Aurora," on the high seas and within the Admiralty jurisdiction of the High Court of Judicature at Bombay, feloniously, &c. did set fire to the said ship, against the form of the statutes, &c.

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II. Same as the last, with the addition of an allegation of an intention to defraud the Canton Insurance Office.

III. That he, the said Marks, &c., on board the said British ship "Aurora," being a decked vessel of a burden of upwards of 20 tons, within the jurisdiction of the High Court of Judicature at Bombay, did commit mischief by fire to the said vessel, intending to destroy the said vessel, against the form of the statutes, and of the Acts of the Government of India, in such case, &c.

IV. That he, the said Marks, &c., on board a certain British ship called the "Aurora," on a certain voyage upon the high seas, then being upon the high seas and within the Admiralty jurisdiction of the said High Court, feloniously, &c. did set fire to and destroy the said ship, against the form of the statutes, &c., *and that* the said Elmstone, Whitwell, and Harriott, before the said felony was committed in form aforesaid at Bombay, and within the jurisdiction of the said High Court, did feloniously and maliciously incite, move, aid, counsel, hire, and command the said Marks the said felony, in manner and form aforesaid, to do and commit, against the form of the statutes, &c.

V. Same as the last, omitting the words "set fire to and."

VI. That they, the said Elmstone, Whitwell, and Harriott, on the day and year aforesaid, did abet the committing of mischief by fire to a certain British ship, being a decked vessel of a burden of upwards of 20 tons, called the 'Aurora," intending to destroy the said vessel, by engaging in a conspiracy with the said Marks for the committing mischief by fire to the said vessel, with intent to destroy the said vessel, and that mischief by fire was committed to the said vessel in pursuance of such conspiracy, and within the jurisdiction of the High Court of Judicature at Bombay, against the form of the statutes, and of the Acts of the Legislative Council of India, &c.

VII. The same as the last, with the exception that the abetment was alleged to be "by instigating Marks to commit mischief by fire to the said vessel."

VIII. Same as the sixth, omitting the words "by fire."

IX. Same as the seventh, omitting the words "by fire."

Marks pleaded Guilty generally.

Elmstone, Whitwell, and Harriott pleaded Not Guilty, but were convicted on the fifth, eighth, and ninth heads of charge, and acquitted on the others.

The facts were briefly as follow:—

When, in May 1870, the "Aurora," a British ship of 1,155 tons burden, was being laden in the harbour of Bombay with cotton and other cargo for a voyage to Liverpool, the prisoners Elmstone and Whitwell, who were the brokers of the "Aurora," and Harriott, her master, determined between themselves that "the ship should not reach Liverpool." In order to effect their design, they bribed Marks, the carpenter of the ship, to destroy her. No arrangement was come to as to the manner in which the "Aurora" was to be destroyed, but Marks undertook that she should not reach Liverpool. The object of Elmstone and Whitwell seemed to have been to defraud the underwriters upon certain cargo supposed to have been shipped by Elmstone and Whitwell. Harriott was to receive a share of the plunder.

The "Aurora" sailed from Bombay on the 11th of June 1870 with Harriott and Marks on board, Elmstone and Whitwell remaining in Bombay. On the morning of the 12th of June, when the ship was about fifty miles off the harbour, Marks set her on fire, and, no effort having been made to extinguish the fire, she was burnt to the water's edge, and sank. The master and crew saved themselves in the boat and returned to Bombay, where the four accused persons were arrested, and, by the Chief Magistrate, committed for trial.

The learned Judge (under cl. 25 of the Amended Letters Patent of the High Court) reserved for the opinion of the Full Court the question "whether the prisoners Elmstone, Whitwell, and Harriott could in point of law be convicted on all or any of the charges upon which they had respectively been found guilty, the 'Aurora' having been destroyed by the prisoner Marks (a British subject) by fire on the high

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seas at a distance of fifty miles or thereabouts from the harbour of Bombay." Sentence was deferred until after the decision upon the point reserved.

The point reserved came on for argument, before WESTROPP, C. J., BAYLEY and GREEN, JJ., on the 22nd of July 1870.

The Honorable A. R. Scoble (Acting Advocate General) (with him *Farran*), in support of the conviction, contended that the prisoners Elmstone, Whitwell, and Harriott were properly convicted, as well upon the charges framed under the Penal Code as upon those framed under the Imperial Statutes. 1*st*, as to the Penal Code. If that enactment and the Criminal Law Amendment Act (XVIII. of 1862) stood alone, the conviction could be supported. The act which Marks has committed is one that falls clearly within Sec. 437, and if it had been committed within the territories of British India would be punishable under that section. Though the act of Marks has been committed beyond such territories, and, therefore, may not be punishable under the Indian Acts standing alone, the abetment of it has taken place within those territories; and as the abetment of an illegal act is in itself a substantive offence, under Secs. 107, 108, and 109 of the Penal Code, it is, therefore, punishable under that Code. It will be said that an offence denotes "a thing made punishable by the Code" (Sec. 40), and as the act committed by Marks cannot be punished under the Code, the abetment of it is not an offence under that Code; but that is not so. Sec. 109 provides that whoever abets an offence shall, if the *act* abetted is committed in consequence of the abetment, be punished, &c. The prisoners have in Bombay abetted an offence under Sec. 437, and the *act* abetted has been committed in consequence of such abetment, though the offence, technically speaking, may not have been committed. The section (109) clearly makes a distinction between "offence" and "act." It is true that there is no general specific provision in the Code relating to the abetment of acts committed outside the jurisdiction which if committed within the jurisdiction would be offences under the Code; but

it is submitted that Sec. 109 really cures that defect, and Sec. 20 of the Criminal LawAmendment Act bears out this view. At all events the offence was commenced within the jurisdiction of this court, and that is sufficient to render the prisoners liable to its process: Act XVIII. of 1862, Sec. 30. Any doubt on this subject is removed by 30 & 31 Vict., c. 124, s. 11, which enacts that "if any British subject commits any crime or offence on board any British ship * * *, any Court of Justice in Her Majesty's dominions which would have had cognisance of such crime or offence if committed on board a British ship within the limits of the ordinary jurisdiction of such court shall have jurisdiction to hear *and determine* the case as if the said crime or offence had been committed as last aforesaid." That section gives the court power to determine the offence of Marks as if it had been committed within its local limits. The act of Marks is, therefore, an offence punishable under the Penal Code, and all difficulty as to the punishment of the abetment of it is thus got rid of.

II. The prisoners are also punishable under the English law, Stat. 24 & 25 Vict., c. 97, ss. 42, 43. The Stat. 12 & 13 Vict., c. 96 (extended to India by 23 & 24 Vict., c. 88) renders Marks amenable in this court to punishment according to English law: *The Queen* v. *Thompson* (*a*). The other prisoners are, therefore (if not under the Accessories Act, 24 & 25 Vict., c. 94, ss. 7 and 9), under 9 Geo. IV., c. 74, s. 7, which is still unrepealed, liable as accessories before the fact. The remedy afforded by the Penal Code is cumulative, as that Code and the English Statutes are not inconsistent with one another: *R.* v. *Carlile* (*b*); *Richards* v. *Dyke* (*c*); *Ex parte Warington* (*d*). The Merchant Shipping Act, 1854 (17 & 18 Vict., c. 104), Sec. 267, and the Merchant Shipping Amendment Act (18 & 19 Vict., c. 91), Sec. 21; the Charter of the late Supreme Court, cl. 54, and the Letters Patent of the High Court, cl. 32, were also referred to.

(*a*) I. Beng Law Rep., Or. Cr. Jur. 1. (*b*) 3 B. & Ald. 161.
(*c*) 3 Q. B. 256. (*d*) 3 De Gex M. & G. 159.

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McCulloch and *Starling* (with them *Latham*), for Elmstone and Whitwell, admitted that the prisoners were liable to punishment under the Penal Code, and contended that the English law had no application. If the Stat. 30 & 31 Vict., c. 124, had not passed, then Marks would have been punishable under the English law, Stat. 24 & 25 Vict., c. 97, ss. 42, 43, and Stat. 9 Geo. IV., c. 74, s. 7, would have rendered the Stat. 24 & 25 Vict., c. 97, s. 42, applicable to the other prisoners. That is the effect of *The Queen* v. *Thompson*; but since the passing of that statute (30 & 31 Vict., c. 124, s. 11) Marks must be tried and punished as if his offence had been committed in India. That this is so is clear from the words used in Sec. 11: "The Courts shall have jurisdiction to hear *and determine* the offence, as if it had been committed within their local limits." In Sec. 287 of the Merchant Shipping Act the words used were: "All offences committed afloat out of Her Majesty's dominions by any seaman * * * shall be liable to the same punishment, and shall be inquired of, heard, tried, determined, and adjudged in the same manner * * * as if such offences had been committed within the jurisdiction of the Admiralty of England." That statute made offences committed on the high seas by seamen triable and punishable according to English law. Then came 18 & 19 Vict., c. 91, sec. 21, which extended the scope of the former Act and introduced the local criminal procedure, but left the punishment to be inflicted the punishment which would have been inflicted if the offence had been tried in England, the words used being "that if any person being a British subject charged with having committed any crime or offence on the high seas is found within the jurisdiction of any Court of Justice in Her Majesty's dominions . . . . such court shall have jurisdiction to hear *and try* the case as if such crime or offence had been committed within such limits." The substitution in Stat. 30 & 31 Vict., c. 124, of the words "hear and determine" for the words "hear and try" in Stat. 18 & 19 Vict., c. 91, indicates the desire of the Legislature to substitute the substantive criminal law of the place in which

the offence is tried (as well as its procedure) for the substantive English law. If, then, the offence of Marks is, by the statute last cited, rendered punishable by the Penal Code, the other prisoners are also punishable under that Code for abetting the offence of Marks; and under that Code only; for Sec. 2 enacts that "every person shall be liable to punishment under this Code, and *not otherwise*, for every act or omission contrary to the provisions thereof of which he shall be guilty," &c. Even without that provision, the Penal Code, on being made applicable to this offence, would have repealed the former law, as it alters the punishment to be inflicted: *Michell* v. *Brown* (*e*), *Rex* v. *Cross* (*f*), *R.* v. *Davis* (*g*); and changes the class of the offence. The case of *Reg.* v *A'lú Párú* (*h*) was also referred to and commented upon at large on both sides, and the power of the Indian Legislature to legislate for crimes committed on the high seas was discussed.

The Honorable A. R. Scoble in reply.

Cur. adv. vult.

July 30th, 1870. WESTROPP, C.J.:—This case comes before the Full Court on a point of law reserved by my brother Bayley, under the 25th and 26th sections of the High Court Charter of 1865.

Upon the original charges on which the prisoners stood committed for trial by the Magistrate, they, with the consent of the Crown, have not been arraigned. They were arraigned upon the additional charges filed by the Clerk of the Crown, under the authority conferred upon him by Sec. 4 of Act XIII. of 1865.

One of those additional charges, founded upon the English statutes, described the prisoner Richard William Marks as a British subject and seaman, and alleged that he, "on the 12th day of June 1870, on board a British ship or vessel called the 'Aurora,' on a certain voyage upon the high seas, and within the Admiralty jurisdiction of the High Court of Judicature at Bombay, feloniously, unlawfully, and

(*e*) 1 Ellis & E. 267. (*f*) 1 Ld. Raymond 711.
(*g*) Say. 133; I. Leach 271.
(*h*) Perry Or. Ca. 551; 3 Moo. Ind. App. 488, S. C.; 5 Moo. P. C. C. 296.

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maliciously did *set fire* to and destroy the said ship 'Aurora,' against the form of the statutes in such case made and provided, and against the peace of our Lady the Queen, her Crown and Dignity." Another of those additional charges was "that he, the said Richard William Marks, afterwards—to wit, on the day and year aforesaid—on board the said ship 'Aurora,' on a certain voyage upon the high seas, then being upon the high seas, and within the Admiralty jurisdiction of the High Court of Judicature at Bombay, feloniously, unlawfully, and maliciously did *set fire* to the said ship, with intent thereby to prejudice 'The Canton Insurance Office,' which had before then underwritten a certain policy of insurance on certain goods then being on board the said ship, which said policy was then in full force and operation, against the form of the statutes in such case made and provided, and against the peace of our Lady the Queen, her Crown and Dignity."

To both of those charges Marks pleaded Guilty.

The prisoners Christopher Thomas Elmstone, Alfred Whitwell, and George Harriott were charged as accessories before the fact to the felonies comprised in those two charges, but, having respectively pleaded Not Guilty thereto, have been tried and acquitted of those charges.

The prisoners were further charged by the Clerk of the Crown as follows :—

"That the said Richard William Marks, British subject and seaman, on the day and year aforesaid, on board a certain British ship or vessel called the 'Aurora,' on a certain voyage upon the high seas, then being upon the high seas, and within the Admiralty jurisdiction of the High Court of Judicature at Bombay, feloniously, unlawfully, and maliciously did destroy the said ship 'Aurora,' against the form of the statutes in such case made and provided, and against the peace of our Lady the Queen, her Crown and Dignity; and that the said Christopher Thomas Elmstone, Alfred Whitwell, and George Harriott, before the said felony was committed in form aforesaid, at Bombay, and within the jurisdiction of the

said High Court of Judicature, did feloniously and maliciously incite, move, aid, counsel, hire, and command the said Richard William Marks the said felony in manner and form aforesaid to do and commit, against the form of the statutes in such case made and provided, and against the peace of our Lady the Queen, her Crown and Dignity." To this Marks, as alleged principal, pleaded Guilty, and Elmstone, Whitwell, and Harriott, as alleged accessories before the fact, pleaded Not Guilty, but have, as such accessories before the fact, been found guilty by the jury.

The prisoners Elmstone, Whitwell, and Harriott stood further charged on two counts by the Clerk of the Crown, under Acts of the Government of India (which, of course, include the Indian Penal Code), with having abetted the committing of mischief *by fire* to the same vessel, with intent to destroy her; and, on pleading Not Guilty thereto, have been acquitted. They, however, stood further charged, on the Indian Penal Code, by the Clerk of the Crown, as follows:—

"3. That they, the said Christopher Thomas Elmstone, Alfred Whitwell, and George Harriott, afterwards—to wit, on the day and year aforesaid—at Bombay aforesaid, did abet the committing of mischief to the said British ship called the 'Aurora,' being a decked vessel of a burden of upwards of twenty tons, intending to destroy the said vessel, by engaging in a conspiracy with the said Richard William Marks, a British subject, for the committing of mischief to the said vessel, with intent to destroy the said vessel, and that mischief was committed to the said vessel in pursuance of such conspiracy, within the jurisdiction of the High Court of Judicature at Bombay, against the form of the Statute, and of the Act of the Legislative Council of India, in such case made and provided, and against the peace of our Lady the Queen, her Crown and Dignity.

4. "That they, the said Christopher Thomas Elmstone, Alfred Whitwell, and George Harriott, afterwards—to wit, on the day and year aforesaid—did abet the committing of

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mischief to the said British ship called the 'Aurora,' intending to destroy the said vessel, by instigating the said Richard William Marks, a British subject, to commit mischief to the said vessel, with intent to destroy the said vessel, and that mischief was committed to the said vessel in consequence of such instigation, within the jurisdiction of the High Court of Judicature at Bombay, against the form of the Statute and of the Act of the Legislative Council of India in such case made and provided, and against the peace of our Lady the Queen, her Crown and Dignity."

To these two latter charges (in which it will be observed that neither fire nor any other means of destruction is specified) Elmstone, Whitwell, and Harriott pleaded Not Guilty, but were found guilty upon them by the jury.

The point as reserved was "whether the prisoners Elmstone, Whitwell, and Harriott could in point of law be convicted on all or any of the charges of which they have been respectively found guilty, the 'Aurora' having been destroyed by the prisoner Marks (a British subject) by fire on the high seas, at a distance of fifty miles or thereabouts from the harbour of Bombay." The form which that question assumed in argument was, whether the English or Indian law is the *substantive* law properly applicable to the cases of the four prisoners, or of any of them. All four prisoners have been present during the argument. Counsel on behalf of Elmstone and Whitwell only have argued the point. Harriott was not, during the argument, represented by counsel. Counsel on behalf of Marks, who pleaded Guilty, did not seek to have any point of law reserved as to him, and, therefore, has not addressed this court. His reason, no doubt, for not seeking to have any point reserved was that the maximum amount of penal servitude to which Marks would be subject under either law is the same (Indian Penal Code, Sec. 438, combined with Sec. 56; Stat. 24 & 25 Vict., c. 97, ss. 42, 43). It will, however, be necessary to ascertain on which of the charges to which he has pleaded guilty—those under the Indian, or those under the English, law—the sentence to be passed on him should be entered. It was admitted by the

Advocate General, on behalf of the Crown, and by Mr. McCulloch and Mr. Starling on behalf of Elmstone and Whitwell, that the law of procedure applied to the case was properly that prevailing in the High Courts of Calcutta, Bombay, and Madras in the exercise of their original criminal jurisdiction. We also are of the same opinion. It is supported by the decision, unanimous on that point, of Sir Barnes Peacock, C.J., and Phear and Macpherson, JJ., in *The Queen* v. *Thompson* (1 Bengal L. R., Cr. Ca. 1). But as to the substantive law—the law under which the punishment should be inflicted—counsel for Elmstone and Whitwell contend that, so far as regards them and Harriott, the substantive law properly applicable is Sec. 437 of the Indian Penal Code (Act XLV. of 1860) taken in combination with Secs. 56 and 109 of the same Code; Sec. 20 of Act XVIII. of 1862 (both of which latter sections relate to abetment), and Stat. 30 & 31 Vict., c. 124, s. 11. The Advocate General contends that those three prisoners are punishable either under the English law, or the Indian law, at the option of the Court.

It has been proved that the "Aurora" was a decked vessel of 1,155 tons burden, and was destroyed by Marks, her carpenter, at the instigation of the three other prisoners —Elmstone and Whitwell, her brokers, and Harriott, her master. That instigation took place in Bombay, before the "Aurora" sailed for England, and while she was lying in Bombay harbour, within the local limits of the ordinary original criminal jurisdiction of this court. The choice of the means of destruction seems to have been left to Marks. He, subsequently, when the vessel was on the high seas on her voyage to England, about fifty miles off the coast, selected fire as the medium of destruction, and burnt her. Harriott, the master, was on board, but was not present in that part of the vessel which Marks set on fire, when the latter did so. Elmstone and Whitwell remained in Bombay. We have already stated that Elmstone, Whitwell, and Harriott were acquitted on the charges, founded on the English statutes, of being accessories before the fact to the

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destruction of the vessel *by fire*, and also on the charges, under the Indian law, of abetment of destruction *by fire*, but, subject to the point reserved, have been convicted on the charge, under the English statutes, of being accessories before the fact to the destruction of the vessel, and upon the charges, under the Indian law, of abetting her destruction.

First, as to the local law—the law of British India—three questions have been touched upon in argument: (1) Had the Indian Legislature power to legislate for the high seas, in such cases as the present? (2) Is there an enactment of the Indian Legislature, applicable to this case, now in existence? (3) Assuming that the Indian Legislature has legislated as to the destruction of vessels, but had not power to legislate for such cases occurring on the high seas, has the Imperial Legislature, by subsequent enactment, rendered the Indian legislation as to the destruction of vessels, or the abetment thereof, applicable to such destruction when occurring on the high seas, or to the abetment thereof? If all of these questions, or if the 2nd and 3rd questions, must be answered in the negative, it was not denied that the enactment (Stat. 24 & 25 Vict., c. 97, ss. 42, 43) now in force in England, relating to the offence of destroying ships, was that under which the punishment should be inflicted.

The Indian Legislature, which passed Act XXXI. of 1838 and the Indian Penal Code (Act XLV. of 1860), to which enactments we shall presently have occasion to refer, was the Governor General in Council, whose legislative authority was created by the Imperial Stat. 3 & 4 Wm. IV., c. 85 (passed in 1833), "An Act for effecting an arrangement with the East India Company, and for the better government of His Majesty's Indian Territories, till the 30th day of April 1854," which, by Sec. 34, enacted that "the said Governor General in Council shall have power to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force, or hereafter to be in force, *in the said territories or any part thereof*, and to make laws and regulations *for all persons, whether British or Native,*

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foreigners or others, and for all Courts of Justice, whether established by His Majesty's Charters or otherwise, and the jurisdictions thereof, and for all places and things whatsoever, *within and throughout the whole and every part of the said territories,* and for all servants of the said Company within the dominions of Princes and States in alliance with the said Company; save and except that the said Governor General in Council shall not have the power of making any laws or regulations which shall in any way repeal, vary, suspend, or affect any of the provisions of this Act, or any of the provisions of the Acts for punishing mutiny and desertion of officers and soldiers, whether in the service of His Majesty or the said Company, *or any provisions of any Act hereafter to be passed in any wise affecting the said Company, or the said territories, or the inhabitants thereof,* or any laws or regulations which shall in any way affect any prerogative of the Crown, or the authority of Parliament, or the constitution or rights of the said Company, or any part of the unwritten Laws or Constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the Sovereignty or Dominion of the said Crown over any part of the said territories." Some variation was made as to the members of the Council by Stat. 16 & 17 Vict., c. 95 (passed in 1853), but none as to its powers, except by Sec. 25, which in effect authorised the Governor General in Council to pass, with the previous sanction of the Crown, laws or regulations affecting the royal prerogative. We have occasionally, in arguments here, heard the authority of the Governor General in Council, under those statutes, to legislate for the high seas, disputed, sometimes to the extent of any legislation whatsoever, at other times to the extent of any legislation in respect of vessels not belonging to British India, or in respect of persons not natives of British India. In *The Queen* v. *Alú Párú* (*a*) it was contended at the trial "that the court had no jurisdiction, for that the offence (of burning the ship "Belvidere") being committed by Stephenson (the master) on the high

(*a*) Perry's Or. Ca. 551. Alú Párú was sentenced to transportation for life, not for ten years, as erroneously stated in the report in Or. Ca. 551.

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seas, the Legislative Council had no authority to legislate for offences there committed, and that if there was no jurisdiction over the principal, there was none also over the accessory." Sir Erskine Perry overruled the objection. The enactment upon which A'lú Párú was indicted, convicted, and sentenced was the Indian Act XXXI. of 1838, Secs. 24 and 36. The objection was again raised (several months after sentence had been passed) upon an application to the Full Court for leave to appeal to Her Majesty in Council (Perry's Oriental Cases, p. 555). That application was refused. The report does not furnish the grounds on which Sir Henry Roper, C.J., rested his refusal. The reasons on which Sir E. Perry acted, he stated, were, that "upon analysis of the arguments urged on behalf of the prisoner, they will be found to amount to this, that the words 'against the form of the statute' are not inserted in the indictment.* For it is quite obvious that Stephenson (the principal) might have been indicted for this offence under the Stat. 9 Geo. IV., c. 74, according to the argument of Mr. Howard, or under 7 Wm. IV. and 1 Vict., c. 89; in either of which cases the words I have mentioned would have been sufficient. This being so, and supposing the objection to be a good one, I cannot conceive that it is one to which the Court ought to give way, urged, as it is now for the first time, nine months after the trial, and after the sentence of transportation has been carried into effect, provided, that is to say, that the Court has any discretion to exercise upon the matter." The learned Judge, however, went further than this, for after referring to the 43rd section of the Stat. 3 & 4 Wm. IV., c. 85, which we have already quoted, and to the words in it, "within and throughout the whole and every part of the said territories," he said: "It is contended that these latter words apply to the persons who are to be legislated for, as well as to the places and things with which they are immediately collocated. But the express distinction, which is made in the Act, between persons and things, lies deeply seated, I apprehend, in the principles of legislation, and

* NOTE.—See Act XVIII of 1862, Sec. 40, as to formal conclusion of a count or charge.—ED.

corresponds with the distinction well known to jurists between personal and real statutes." He then proceeds to assign reasons in support of his view that the Stat. 3 & 4 Wm. IV., c. 85, had conferred power on the Indian Legislature to legislate for the high seas, with which reasons we cannot say that we are altogether satisfied. One of them seems to be in the nature of an *argumentum ab inconvenienti*, namely, that the Indian Legislature has the power to legislate for the high seas, because it would be inconvenient that it should not have such a power. He says: "But can it be contended for a moment that it is not essential to a government like that of India, to be able to prevent excesses and enormities committed on its coasts, or on the uninhabited and barbarous islands in the Indian seas?" We may observe that the Privy Council declined to resort to similar reasoning *ab inconvenienti* as to the construction of the Stat. 9 Geo. IV., c. 74, s. 56, in the case of *Nga Hoong* v. *The Queen* (*b*). The appellants in that case, who were natives of Burmah, and native subjects of the East India Company, representing the Crown, were convicted before the Supreme Court of Calcutta, in 1857 of having, in 1855, murdered a man in Wah Gyoon, one of the Coco Islands, in the Bay of Bengal. The Judges of the Supreme Court differed as to their jurisdiction; Colvile, C.J., and Buller, J., upholding the jurisdiction, and consequently the conviction, and Jackson, J., dissenting. On appeal the Privy Council agreed with him, and held that the Supreme Court had no jurisdiction, and that the judgment of death against the appellants could not be sustained. Sir E. Perry, J., in *Reg.* v. *A'lú Párú*, continued: "Suppose that the fishermen on this coast were discovered to be engaged in a series of fraudulent transactions half a mile from the shore, can it be contended that, under the clause which enables the Governor General in Council to legislate 'for all persons, whether British or Native,' no power exists to regulate fisheries?" Possibly, we may observe, for such a case as that, the Indian Legislature may have power to legislate, though it may be not for

(*b*) 7 Moo. Ind. App. 72, 103; S. C. Boulnois' Rep. 189, 281.

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the high seas at large. According to writers on international law, the territorial right extends to at least three geographical miles, a sea-league, from the coast, that having been supposed to be the range of a cannon-shot: the rule being, according to Bynkershoek, *potestatem terræ finiri ubi finitur armorum vis* (*De Dominio Maris, Cap. II.*). This distance of three miles was the limit lately laid down by the Privy Council, in *Rolet* v. *The Queen* (*c*), for the operation of the Revenue Laws of Sierra Leone. Sir R. Phillimore, in his Commentaries, Vol. 1, plac. CXCVII. (and *see* Vol. 3, plac. CCCLII.) says: "But the rule of law may be now considered as fairly established:—namely, that this absolute property and jurisdiction does not extend, unless by the specific provisions of a treaty, or an unquestioned usage, beyond a marine league (being three miles), or the distance of a cannon-shot from the shore at low tide." He adds, however, that Great Britain and the United States have, for some special purposes relating to the revenue in time of peace, and to the hovering of foreign belligerent vessels in time of war, extended the limit to four leagues. Wheaton (*d*) speaks to the same effect. His commentator, Mr. Lawrence (*e*), suggests that "the distance that a cannon-shot will reach has been increased in a remarkable degree by modern inventions; and, consequently, the sovereignty over the coast may be deemed to be proportionally extended." Adhering, however, for the present, to the distance of three miles from low-water mark, laid down by the Privy Council in *Rolet* v. *The Queen*, as the limit of what is called maritime territory, we must guard ourselves against any supposition that we mean to suggest that the Admiralty Jurisdiction of this court does not commence until that limit be passed. That jurisdiction commences where the open coast terminates. The coast is not the sea adjacent to the land, but is the land which bounds the sea: it is the limit of the land jurisdiction. This limit varies according to the state of the tide.

(*c*) L. R. 1 Priv. C. Ca. 198.
(*d*) Ed. by Lawrence, 1864, pp. 320 to 323.
(*e*) *Ibid.*, p. 321, n. 103.

When the tide is in, and covers the land, the space so covered is sea; when the tide is out the unoccupied space is land as far as low-water mark. The interval between high and low water mark must, therefore, be considered as *divisum imperium*, unless the water be, as Sir John Nicholl says, within a county. (*See* 3 Haggard Adm. Rep. 275, 283.) The case of *Regina* v. *The Pauline* (*f*) well illustrates this doctrine. The vessel in that case was wrecked on the Pole Sands, near the mouth of the Exe, and was taken possession of while stranded there. She then was lying aground within low-water mark, but the tide had not so far ebbed as to leave her dry. In fact the boat, by means of which she was boarded, floated alongside her. The question was whether she was *wreccum maris*, or a droit of the Admiralty; if the former, she belonged to the Lord of the Manor; if the latter, to the Crown. Judgment was given in favour of the Crown. In the course of it Dr. Lushington said: "I apprehend that the distinction taken in all books, and not only with respect to civil rights, but also with respect to criminal jurisdiction, as the law stood before the statute (4 & 5 Wm. IV., c. 36, s. 22), immediately attaches, namely, that the jurisdiction of the Admiralty subsists at the time when the shore is covered with water; the jurisdiction of the common law, and, consequently, the rights of Lords of Manors, at the period when the land is left dry. The doctrine is thus laid down in East's Pleas of the Crown, under the title 'Piracy'—'Upon the open sea-shore it is past dispute that the Common Law and the Admiralty have alternate jurisdiction between high and low water mark. But in harbours, or below the bridges in great rivers near the sea, which are partly inclosed by the land, the question is often more a matter of fact than of law, and determinable by local evidence. There are, however, some general rules laid down upon this point, which it would be improper altogether to omit. It is plain that the Admiralty can have no jurisdiction in any rivers, or arms or creeks of the sea, within the bodies of counties, though within the flux and reflux of the tide.'" The Central Criminal Court

(*f*) 9 Jur. 286; S. C., 3 Notes of Cases, 616.

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in a recent case, unanimously held that the Bristol Channel, at a place where it is ten miles wide, between Glamorganshire and Somersetshire, is within the bodies of these two bounding counties, the line of division being, it would seem, *ad medium filum aquæ*. Therefore, a felony committed on board a ship within three-quarters of a mile of the Glamorganshire shore was held to be committed within the body of the county of Glamorgan: *Reg.* v. *Cunningham* (*g*).

We have said thus much on the Admiralty jurisdiction merely in order to prevent any confusion of its extent with the extent of maritime territory, for which, without travelling beyond the words "within and throughout the whole and every part of the said territories," relied on by counsel in *Reg.* v. *A'lú Párú*, as narrowing the powers of the Indian Legislature, it may probably legislate. In the present case, however, the destruction of the vessel was effected neither *inter fauces terræ*, nor within the three-mile limit of maritime territory, but unquestionably on the high seas, and, therefore, within our Admiralty jurisdiction.

The Stat. 24 & 25 Vict., c. 67, s. 22 (passed A.D. 1861), enabled the Governor General in Council, as by that statute constituted, to make laws and regulations for "all persons, whether British or Native, *foreigners* or others, and for all Courts of Justice whatever, and for all places and things whatever *within the said territories* (of India), and for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty." It provided, however, that this Indian Legislature should not have the power of legislating so as to repeal, or in any way affect, certain Imperial statutes specified therein, "or any provisions of any Act passed in this present session of Parliament (1861), or hereafter to be passed, in any wise affecting Her Majesty's Indian territories, or the inhabitants thereof, or which may affect the authority of Parliament," &c.

(*g*) 28 L. J., N. S., Mag. Ca. 66; S. C. 5 Jur. N. S. 202; 1 Bell C. C. R. 66.

The power given both in that statute, and in the earlier statute (3 & 4 Wm. IV., c. 85, s. 43), to legislate, not only for all persons British and Native, but also for *foreigners*, perhaps furnishes an argument in favour of the construction which applies the words "within and throughout the whole and every part of the said territories" in the one statute, and "within the said territories" in the other, as well to "persons" as to "places and things," as it is scarcely to be supposed that a general power to legislate for foreigners beyond those territories was intended; and if the word "foreigners" be limited to persons within the territories, so must the words "all persons British or Native." It may be said that the intention was to give the power to legislate for foreigners beyond the territories so far as international law would permit, *e.g.*, for foreigners on board British registered or Anglo-Indian registered ships. It is, however, difficult to understand why the Imperial Legislature should delegate to the Indian Legislature, or to any other provincial legislature, the power to legislate *generally*, either for British subjects or foreigners in British registered ships on the high seas. Were it to do so, British subjects and foreigners in British ships might be subjected to conflicting laws in respect of their conduct on the high seas. Yet if the construction of the Stat. 3 & 4 Wm. IV., c. 85, s. 43, which Sir E. Perry put forward in *Reg.* v. *A'lú Párú* be correct, it would seem to involve such a power. It is not improbable that had the Imperial Legislature intended to confer any power upon the Indian Legislature to legislate for the high seas beyond the maritime territory of British India, that power would have been limited to natives of India or persons domiciled in India, and perhaps to British subjects and foreigners in ships belonging to or registered in India. No such distinction is taken in the statutes. Nothing whatever is said as to the high seas, but words are introduced which, consistently with good grammar and the probable intention of Parliament, may be applied so as to limit the general power of legislation to the territory constituting British India. It is evident that the restriction to the territories of British India

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is not confined to the words "all places and things whatever." Common sense requires that in one sense at least that restriction should be also applied to the words "all Courts of Justice whatever." Courts of Justice outside our Indian territories and their dependencies could not have been intended; and, this being so, it is not very easy to say why the territorial restriction should cease there, and not be equally applied to the preceding words, "all persons, whether British or Native, foreigners or others." We have said that in one sense at least the territorial restriction should be applied to the words "all Courts of Justice whatever," that is, as respects the locality of those courts; we should, however, also notice the subsequent words, "and the jurisdictions thereof," which occur in the Stat. 3 & 4 Wm. IV., c. 85, s. 43, but are omitted in the Stat. 24 & 25 Vict., c. 67, s. 22. To these words there would be some difficulty in applying the territorial restriction. They have not been noticed in the judgment in *Reg.* v. *A'lú Párú*, yet it would seem that an argument might have been based on them in support of Sir E. Perry's views as to the authority of the Indian Legislature. On the other hand, the power to legislate for a servants of the Company in one statute (*h*), and for all servants of the Government of India in the other statute (*i*), respectively within the dominions of Princes and States in alliance with the Company or Her Majesty, is special and exceptional, and furnishes a very strong reason for supposing that the previous general power of legislation conferred by the same statutes is limited to the territories of British India. That special power was, in 1865, extended by Stat. 28 & 29 Vict., c. 17, to "all British subjects of Her Majesty within the dominions of Princes or States in India in alliance with Her Majesty, whether in the service of the Government of India or otherwise."

We may here mention a passage at page 24 of Mr. Forsyth's Collection of Cases and Opinions on Constitutional Law, in which he refers to an opinion given by the Law

(*h*) Stat. 3 & 4 Wm. IV., c. 85, s. 43.
(*i*) 24 & 25 Vict., c. 67, s. 22.

Officers of the Crown in February 1855 (Sir J. Harding, Queen's Advocate, Sir Alexander Cockburn, A. G., and Sir R. Bethell, S.G.), as to British Guiana; they said: "We conceive that the colonial legislature cannot legally exercise its jurisdiction beyond its territorial limits three miles from the shore, or, at the utmost, can only do this over persons, domiciled in the colony, who may offend against its ordinances even beyond these limits, but not over other persons;" and an opinion given by Sir J. Harding, in August 1854, on the question within what distance of the coasts of the Falkland Islands foreigners might be legally prevented from whale and seal fishing, he said: "Her Majesty's Government will be legally justified in preventing foreigners from whale and seal fishing within three marine miles (or a marine league) from the coasts, such being the distance to which, according to the modern interpretation and usage of nations, a cannon-shot is supposed to reach." And at page 32 Mr. Forsyth says that a "question arose with respect to the validity of Act I. of 1849 (of the Government of India), by which jurisdiction was given over offences committed by *all* British subjects in foreign States; and the Law Officers of the Crown and myself (Mr. F.) were of opinion, in 1866, that in the case of offences committed in foreign States by *native* Indian subjects of the Crown, the Governor General in Council had not the power to make laws for their apprehension and punishment in British India, for we thought that the power was restricted by Stat. 24 & 25 Vict., c. 67, s. 22, and 28 & 29 Vict., c. 17." In consequence of that opinion, Parliament, in 1869, passed the Stat. 32 & 33 Vict., c. 98, empowering the Governor General in Council to make laws and regulations for all *native Indian subjects* of Her Majesty, her heirs and successors, without and beyond, as well as within the Indian territories under the dominion of Her Majesty. The same statute (Sec. 2) provided that "no law heretofore passed by the Governor General of India, or by the Governors of Madras and Bombay, respectively, in Council, shall be deemed to be invalid solely by reason of its having reference to native subjects of Her Majesty not within the

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Indian territories under the dominion of Her Majesty." This statute, as well as the Stat. 28 & 29 Vict., c. 17, still leaves the power of the Indian Legislature to bind British subjects on the high seas, or foreigners in British vessels on the high seas, an open question. Beyond saying that we do not think that the remarks in the case of *Reg.* v. *A'lú Párú* can be considered as having conclusively settled that question, we do not, for reasons which will presently appear, think it necessary to give any positive opinion upon it, and have said so much out of respect to the arguments at the bar founded upon the remarks in that case. It should be recollected that *A'lú Párú* and the two other persons convicted with him under Act XXXI. of 1838 were accessories in India, not principals upon the high seas. Whether it is possible that the decision there was right, although the remarks in that case as to the power of the Governor General in Council to legislate for crimes committed on the high seas may not have been sustainable, we do not purpose to give any opinion. Assuming that such a power does not belong to the Indian Legislature, it may be that it has authority to legislate for accessories on shore, within our Anglo-Indian territories, to crimes committed upon the high seas, or elsewhere beyond these territories. That it has professed to legislate against abetment, within these territories, of certain special offences committed beyond them, shall presently be shown.

The proviso in the Stat. 3 & 4 Wm. IV., c. 85, and 24 & 25 Vict., c. 67, that the Indian Legislature shall not repeal, or in any way affect, certain Imperial statutes, it will be necessary that we should hereafter refer to.

We now turn to the second point, namely, Has the Indian Legislature, for cases such as the present, legislated, or affected to legislate, for the high seas, either as regards principals or accessories before the fact? Before mentioning any Indian Acts, it is necessary first to refer to the Imperial Stat. 9 Geo. IV., c. 74, passed A.D. 1828, for improving the administration of criminal justice in the East Indies, and which

extended (Sec. 1) to "all persons and all places, as well on land as *on the high seas*, over whom or which the criminal jurisdiction of any of His Majesty's Courts of Justice, erected or to be erected, within the British territories under the Government of the United Company of Merchants trading to the East Indies, does or shall hereafter extend." By Sec. 117 of that statute it was enacted "that, if any person shall unlawfully and maliciously set fire to, or in any wise destroy, any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in any wise destroy, any ship or vessel, or shall unlawfully and maliciously set fire to any goods being on board any ship or vessel as cargo, with intent to burn or destroy such cargo, or ship, and with intent thereby to prejudice any owner or part-owner of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

Sec. 7 of the same statute, "for the more effectual prosecution of accessories before the fact to felony," enacted that "If any person shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at Common Law, or by virtue of any statute or statutes made or *to be made*, the person so counselling, procuring, or commanding shall be deemed guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal shall, or shall not, have been previously convicted, or shall, or shall not, be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished; *and the offence of the person so counselling, procuring, or commanding, howsoever indicted, may be inquired of, tried,*

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determined, and punished by any Court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed either on the high seas, or at any place on land, whether within His Majesty's dominions or without; and that in case the principal felony, and the offence of counselling, procuring, or commanding, shall have been committed in different places, the lastmentioned offence may be inquired of, tried, determined, and punished in any of His Majesty's Courts of Justice within the British territories under the Government of the said United Company, having jurisdiction to try either of the said offences: Provided always that no person who shall be once duly tried for any such offence, whether as an accessory before the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence."

Neither the first section, stating the scope of that statute, nor the seventh section, relating to accessories before the fact to any felony at Common Law, or by virtue of any statute or statutes made, *or to be made*, appears to have been repealed either by the Indian or English Legislatures. But Act XXXI. of 1838 of the Government of India purports (Sec. 1) to repeal (amongst others) Sec. 117 of that statute (9 Geo. IV., c. 74), relating to the destruction of ships by fire or otherwise, and to substitute for that section the following enactments by its 22nd and 24th sections: Sec. 22— "Whosoever shall unlawfully and maliciously set fire to, cast away, or in any wise destroy, any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered, shall be guilty of felony, and, being convicted thereof, shall suffer death" (which section is identical in language with that of the English Stat. 7 Wm. IV. & 1 Vict., c. 89, s. 4). Sec. 24: "Whosoever shall unlawfully and maliciously set fire to, or in any wise destroy, any ship or vessel, whether the same be in a complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in any wise destroy, any ship or vessel, with intent thereby to prejudice any

owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported to such place as the Court shall direct, for life, or for any term of years, or to be imprisoned for any term not exceeding four years."

It was upon that section (24), combined with Sec. 36 of the same Act, relating to accessories, that A'lú Párú and his two accomplices were indicted as accessories before the fact to the burning of the "Belvidere" by Stephenson. Sec. 24 was taken, but not *verbatim*, from the English Stat. 7 Wm. IV. & 1 Vict., c. 89, s. 6 (referred to by Sir E. Perry, Oriental Cases, p. 555). This Act of the Indian Legislature (XXXI. of 1838) purported (Sec. 2) to "extend to all persons and over all places over whom or which the criminal jurisdiction of any of Her Majesty's Courts of Justice within the territories under the Government of the East India Company extends, but not further or otherwise." If these words "within the territories," &c. are to be understood as merely indicating the locality of the Courts of Justice, and not as applicable to and limiting the sense in which the words "the criminal jurisdiction" are here employed, the Indian Legislature did, by Act XXXI. of 1838, legislate for the high seas, because the Supreme Courts had an Admiralty criminal jurisdiction over them; and the first question, already discussed, would arise as to whether the Indian Legislature had power to pass Secs. 22 and 24, so far as regarded the high seas, beyond the three-mile limit, and could repeal Stat. 9 Geo. IV., c. 74, s. 117, so far as it affected the high seas, beyond that limit. If Act XXXI. of 1838 is to be considered as affecting the territories of India only, then it did not repeal Stat. 9 Geo. IV., c. 74, s. 117, so far as it related to the high seas beyond the bounds of the maritime territory of India. These were important questions when A'lú Párú's case was at issue, but it

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is not necessary that we should now determine them, as Act XXXI. of 1838 was wholly and expressly repealed by Act II. of 1869. Act XXXI. of 1838 had previously, so far as regards our Indian territories at least, been virtually repealed by the Indian Penal Code (XLV. of 1860), when it came into operation, namely, on the 1st of January 1862. (See Act VI. of 1861.)

The Indian Penal Code, Sec. 437, enacts that "Whoever commits mischief to any decked vessel, or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine." Upon two charges founded on that section, coupled with Sec. 109, relating to abettors, the prisoners Elmstone, Whitwell, and Harriott have been, as already stated, convicted. Sec. 438 enacts that "Whoever commits, or attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine." To a charge based upon that section, Marks, as already stated, pleaded Guilty.

As to those enactments (Secs. 437 and 438), it should be observed that they do not mention the high seas, or necessarily apply to the destruction of vessels, by fire or otherwise, thereon. A sufficient field for the operation of those enactments presents itself in the rivers, creeks, harbours, estuaries, &c., of British India, and all round its coast to a distance of three miles. That the true scope of those sections (437 and 438) did not, at all events, exceed this, is, we think, shown by the earlier sections in the Indian Penal Code itself.

The Indian Penal Code, by Sec. 1, takes effect "throughout the whole of the territories which are or may become vested in Her Majesty by the Stat. 21 & 22 Vict., c. 106,"

passed in 1858, and which transferred British India to the Crown. Those were: "All the territories in the possession or under the Government of the East India Company." The 2nd section of the same Code enacts that "every person shall be liable to punishment under this Code, and not otherwise, *for every act or omission contrary to the provisions thereof*, of which he shall be guilty *within the said territories*" after the Act came into force. That section would exclude the destruction of a vessel at a distance of more than three miles from the coast, as being an offence committed beyond the said territories. The 3rd section enacts that "any person liable, *by any law passed by the Governor General in Council*, to be tried for an offence committed *beyond the limits of the said territories*, shall be dealt with according to the provisions of this Code for any act committed beyond the said territories, in the same manner as if such act had been committed within the said territories." The present case is not one provided for by any *extant* Act of the Governor General in Council. The 4th section applies to servants of the Queen who commit offences against this Code within the dominions of any Prince or State in alliance with the Queen. The 5th section is as follows:—"Nothing in this Act is intended to repeal, vary, suspend, or affect any of the provisions of the Stat. 3 & 4 Wm. IV., c. 85, or of any Act of Parliament passed after that statute, in any wise affecting the East India Company, or the said territories, or the inhabitants thereof; or any of the provisions of any Act for punishing mutiny and desertion of officers and soldiers, in the service of Her Majesty, or of the East India Company, or of any Act for the government of the Indian Navy, or of any special or local law."

So far as regards the case of the prisoner Marks, it is clear that it does not come within the Penal Code standing alone, and unaided by any other enactment. The offence to which he has pleaded Guilty was committed at a distance of about fifty miles from the coast of India, and, therefore, not within the territories which are vested in Her Majesty by the Stat. 21 & 22 Vict., c. 106 (namely, the territories in

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the possession or under the government of the East India Company), as required by Secs. 1 and 2 of the Penal Code, nor was he a person liable by any law passed by the Governor General in Council to be tried for an offence committed beyond the limits of the said territories, as required by Sec. 3 of the Penal Code, nor was he a servant of the Queen within its 4th section.

If the case of Elmstone, Whitwell, and Harriot can be brought within the Indian Penal Code, the section which, in conjunction with Sec. 437, would be applicable to it, is Sec. 109. It is as follows:—"Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence." For the scope and meaning of the word "offence," occurring in this section, we must look to Sec. 40, which forms part of the glossary to the Code. It states, in language neither felicitous nor logical, that "the word 'offence' denotes a thing made punishable by this Code." Mr. Mayne, accordingly, upon Sec. 109, rightly observes: "The offence of abetment can only be committed in respect of offences under the Penal Code; not of offences punishable under a special or local law (3 R. C. C., C. R. 31, 33); nor of offences punishable under the English law. This defect is not cured by Act IV. of 1867. Possibly a person who instigated another to commit an offence against the Railway Act, or to commit a murder on the high sea, might be successfully indicted as an accessory before the fact." The authorities referred to by Mr. Mayne for the proposition that the offence of abetment cannot be committed of offences punishable under a special or local law, are contained also in the 7th volume of the Calcutta Weekly Reporter, at pages 53 and 54; one was *The Queen* v. *Kullimoodin*, in 1867, where the prisoner had been convicted of abetting the sale of liquor to a European soldier, such sale being contrary to a special law—the Excise Act XXI. of 1856—which did not contain any provision for the punishment of abetment. The other was *The Queen* v. *Ramlugun Lall*

Moonshee and others also in 1867, where one of the prisoners was convicted, under Sec. 109 of the Penal Code, of abetting an offence under Sec. 48 of a special Act—the Post Office Act (XIV. of 1866)—which did not provide any punishment for abetment. The High Court of Calcutta (Kemp and Glover, JJ., present) quashed both of these convictions. We are aware of the case reported in the Appendix, p. xi., of the 3rd volume of the Madras High Court Reports, in which a majority of the Judges of that Court held that an offence committed against special or local laws, being, in their opinion, represented or recognised by Sec. 5 of the Penal Code as punishable, should be regarded as coming within the meaning given to the word "offence" in Sec. 40, and accordingly be regarded as "a thing made punishable by this Code." It is impossible not to value highly the ingenuity and ability by which that construction was arrived at, but, independently of the aid which can now be derived from subsequent legislation, we should have been disposed to adopt the opinion expressed in the able judgment of Innes, J., that the words "a thing made punishable by this Code" mean "an act or omission which by this Code is constituted one to which a punishment is attached," and also his view of Sec. 5, of which he says: "It cannot be viewed, as it seems to me, as incorporating into the Code, or even giving the authoritative recognition of the Code to, special and local criminal laws, in such a sense as would warrant our saying that it represents, as punishable, acts and omissions in violation of the provisions of these special and local laws. The liability under such laws is simply stated to be left unaffected, in order to define clearly the extent to which the old law is rendered inoperative." The Indian Legislature has, by the preamble to Act IV. of 1867, placed it beyond all doubt that the word "offence," as used in the Penal Code, did not include acts or omissions made punishable by any special or local law. Act IV. of 1867, after reciting that "it is expedient *to enlarge* the meaning of the word 'offence' in certain sections of the Indian Penal Code, so as to make it denote not only anything made punishable by the

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said Code, but also anything made punishable by any special or local law, as therein defined," enacted that certain sections, which it specified, of that Code "shall be construed as if the word 'offence' denoted anything made punishable by the said Code, or by any special or local law as therein defined;" and certain other sections, which it also specified, "of the said Code shall be construed in the same way, when the thing made punishable by the special or local law is punishable by such law with imprisonment for a term of six months or upwards, whether with or without fine." That Act left unmentioned and untouched (amongst many other sections) the sections 109, 437, and 438 of the Penal Code.

Certain recently passed special Acts of the Governor General in Council testify that abetment of the offences constituted by those Acts would not, without special provision to that effect, be punishable under the general provisions contained in Ch. V. of the Indian Penal Code relating to abetment, and that it was necessary expressly to provide that abetment of those offences should be so punishable. One of those special Acts is Act V. of 1869 (the Indian Articles of War), Tit. II., Ch. VI., Art. 71. Another is Act XVIII. of 1869 (the General Stamp Act), Sec. 36.

Hence it follows that, if Imperial statutes, providing generally for the trial and punishment of persons committing offences upon the high seas, *e. g.*, such as the Merchant Shipping Act and the Acts passed in amendment of it, should be considered "special laws," as defined by Sec. 41 of the Indian Penal Code, which says that "a special law is a law applicable to a particular subject," the circumstance, that special laws are expressly saved by Sec. 5 of the same Code, does not render offences coming within such statutes offences within the meaning of Sec. 109 of the Indian Penal Code. If, on the other hand, those statutes cannot be considered as special laws, then, inasmuch as the crime here abetted was committed on the high seas, and not within the territories vested in Her Majesty by the Stat. 21 & 22 Vict., c. 106, and, therefore, not an offence made punishable by

the Penal Code, the abetment thereof is not punishable under Sec. 109 of that Code, so far as the Code itself, standing alone and unaided by any other enactment, is concerned.

While discussing this subject of abetment, we think it right not to pass over Secs. 121, 125, and 236 of the Penal Code. Sec. 121 enacts that "whoever wages war against the Queen, or attempts to wage such war, or *abets the waging of such war*, shall be punished with death, or transportation for life, and shall forfeit all his property."

The second illustration (b) to that section is as follows:—"A in India abets an insurrection against the Queen's Government of Ceylon, by sending arms to the insurgents; A is guilty of abetting the waging of war against the Queen."

Here we find abetment, in British India, of an offence itself committed beyond British Indian territory, namely, in Ceylon, specially rendered punishable in British India. It may be that the Indian Legislature had power so to legislate as to abetment in India of an offence committed out of India, and may not have had power to legislate for the principal offence itself if committed beyond British Indian territory.

No such *special* provision has been made by the Indian Penal Code, or any other Act of the Government of India now extant, for the punishment of abetment in India of offences such as the present when committed on the high seas at a distance exceeding three miles from the coast.

Sec. 125 enacts that "whoever wages war against the government of any Asiatic power in alliance or at peace with the Queen, or attempts to wage such war, *or abets the waging of such war*, shall be punished with," &c.

The extent of the operation of this section may be doubtful. In dealing with it, the fact that it is an enactment prior in time to the Stat. 28 & 29 Vict., c. 17, and 32 & 33 Vict., c. 98, should be remembered.

Sec. 236 enacts that "whoever, being within British India, *abets* the counterfeiting of coin out of British India, shall be punished in the same manner as if he abetted the counterfeiting of such coin within British India." This is

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special legislation, similar to that in Sec. 121. The remark made upon that section applies to this also.

Act XVIII. of 1862, Sec. 20, enacted that "a person may be indicted and punished for abetting an offence which has been committed in consequence of the abetment, notwithstanding the person who committed the offence shall not have been indicted or found guilty, or shall not be in custody or amenable to justice; and every abettor of an offence may be indicted, tried, and *punished* for the abetment as a substantive offence, and may be tried, either jointly with the principal offender or separately, and punished, by any of Her Majesty's Supreme Courts of Judicature which would have power to try the principal offender, or which would have power to try the abettor if he had committed the offence himself, either in the place in which he is guilty of the abetment, or in the place in which any act shall have been committed in pursuance of the abetment." That Act was passed, as stated in its preamble, because, in consequence of the passing of the Indian Penal Code, many of the provisions of Act XVI. of 1852 had become inapplicable, and others required amendment; and it was expedient to repeal that Act, pending the preparation of a Code of Criminal Procedure for the Queen's Courts, to re-enact some of the provisions of that Act, and to make further provision for the administration of criminal justice. Amongst these provisions which had become inapplicable was Sec. 15, relating to accessories to felonies. The Indian Penal Code substituted, by its 5th chapter, the new law of abetment, for the old law, of accessories before the fact. Sec. 20 of Act XVIII. of 1862 regulated the time when, and the manner in which, the abettor should be tried, whether jointly or separately with the principal, and declared that the abetment might be dealt with as a substantive offence, which, in fact, Sec. 108 (of the Penal Code), and the first four accompanying explanations of it, had already done. But we do not understand that Act XVIII. of 1862, Sec. 20, rendered any abetment of an offence punishable, which was not so under the Penal Code, or under special enactments of the Government of

India, and it does not seem to have any bearing on a case still subject to the law as to accessories before the fact.

We should here observe that the Merchant Shipping Act, 1854 (17 & 18 Vict., c. 104), Sec. 267; the Merchant Shipping Amendment Act, 1855 (18 & 19 Vict., c. 91), Sec. 21; and the Stat. 23 & 24 Vict., c. 88, which became law on the 13th of August 1860, and extended Stat. 12 & 13 Vict., c. 96, to India, having been passed subsequently to the Stat. 3 & 4 Wm. IV., c. 85, it would seem that, having regard to the express provisions of its 43rd section as to statutes to be subsequently passed by Parliament, the Indian Legislature, which in 1860 passed the Penal Code, * and whose powers at that time were limited by those provisions as to statutes passed or to be passed subsequently to the Stat. 3 & 4 Wm. IV., c. 85, could not have legislated so as to repeal, vary, or affect the statutes which I have named at the commencement of this sentence, and carefully guarded itself against any supposition that it did so legislate (Sec. 5, Penal Code). We must presently refer again, with greater particularity, to those statutes.

As to Elmstone, Whitwell, and Harriott, we did not understand their learned counsel as seriously contending that the Indian Penal Code and Act XVIII. of 1862 *per se* governed the case of those prisoners. But they relied strongly on the Imperial Stat. 30 & 31 Vict., c. 124, s. 11 (passed in 1867), as rendering the Penal Code applicable to the cases as well of those three prisoners as of Marks, and, if so applicable, as excluding, by virtue of its second section, the English law. The 30th clause of the Charter of this Court, granted in 1865, might perhaps be relied upon also, if the Penal Code be applicable, as excluding the English law. That clause ordains that "all persons brought for trial before the said High Court of Judicature at Bombay, either in the exercise of its original jurisdiction, or in the exercise

* It received the assent of the Governor General on the 6th of October 1860. Its 2nd section provided that it should take effect on the 1st of May 1861, but by Act VI. of 1861 that date was altered to 1st January 1862.

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of its jurisdiction as a court of appeal, reference, or revision, charged with any offence for which provision is made by Act No. 45 of 1860, commonly called the Indian Penal Code, or by any Act, amending or excluding the said Act, which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise." It must, however, be observed that the statute alleged to have rendered the Penal Code applicable was not itself passed until 1867, two years subsequent to the date of the Charter.

The contention of the learned counsel as to that statute brings us to the third question, namely, assuming that the Indian Legislature has not legislated as to the destruction of vessels on the high seas at a distance of more than three miles from the shore, or as to the abetment thereof, but has legislated for such cases occurring within the territories of British India, has the Imperial Legislature by any subsequent enactment rendered that Indian legislation applicable to the destruction of vessels on the high seas, or the abetment thereof?

The Stat. 30 & 31 Vict., c. 124 (which we have mentioned as so strongly relied upon by Mr. McCulloch and Mr. Starling for the prisoners), by its 11th section, enacted that "if any British subject commits any crime or offence on board any British ship, or on board any foreign ship to which he does not belong, any Court of Justice in Her Majesty's dominions which would have had cognisance of such crime or offence if committed on board a British ship within the limits of the ordinary jurisdiction of such Court, shall have jurisdiction to hear and determine the case as if the said crime or offence had been committed as last aforesaid."

At first sight, and without combining with it the Merchant Shipping Act of 1854 and certain Acts in amendment of it, to which we shall presently refer, we certainly were very much struck by the enactment contained in that section. The direction, to hear and *determine* the case as if the crime had been committed within the limits of the ordinary jurisdiction of the Court, seemed to point towards the law prevailing

within those limits as the substantive law applicable to the case.

The common form of a Commission of Oyer and Terminer is to authorise the Commissioners, or three or four of them, of which number such or such a person is to be one, to inquire, by the oaths of twelve men, of all treasons, felonies, and misdemeanours, &c. in such and such place, and to hear and *determine* the same at such times and places as such Commissioners shall appoint, &c., for which purpose the King acquaints them that he has sent a writ to the sheriffs of such counties, commanding them to return juries before them at such days and places as shall be notified by them, &c. : 2 Bac. Ab., Tit. Court of the Justices of Oyer and Terminer, A., p. 155 ; Fitzherbert, N. B. by Hale, 255 (110) ; 2 Hawkins, P. C. 27 ; 2 Hale P. C. 23. By virtue of such a commission, although it may not in terms specify that the Commissioners may adjudge or pass sentence, or award execution, we think that, ordinarily at least, they may do these acts under the authority of the word " determine."

Finding that Stat. 30 & 31 Vict., c. 124, is intituled " an Act to amend the Merchant Shipping Act, 1854," and by its first section enacts that " this Act may be cited as the Merchant Shipping Act, 1867, *and shall be construed with, and as part of, the Merchant Shipping Act,* 1854, hereinafter termed the principal Act," it became necessary to examine the principal Act, and the various Acts passed in amendment of it, or other Acts relating to the punishment of offences committed on the high seas, and which may have been grafted on, or connected with, the Merchant Shipping Code.

The Merchant Shipping Act (1854), 17 & 18 Vict., c. 104, s. 267, is as follows :—

" All offences against property or person committed in or at any place, either ashore or afloat, out of *Her Majesty's dominions,* by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be inquired of, *heard, tried, determined, and adjudged,* in the

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same manner, and by the same Courts and in the same places, *as if such offences had been committed within the jurisdiction of the Admiralty of England;* and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England."

The observations to be made on that Act are: (1) that it applied to masters, seamen, and apprentices employed in British ships only; (2) that the law to be administered, both of procedure and of punishment, was to be that which would be administered as if the offences had been committed within the jurisdiction of the Admiralty of England; (3) that the Legislature has not contented itself with the usual phraseology of a Commission of Oyer and Terminer, namely, "inquire, hear, and determine," but said "inquired of, heard, tried, determined, and adjudged;" (4) that the phrase "Her Majesty's dominions" used in that section (267) includes India, as will appear on referring to Sec. 2 of the same statute, which defines that phrase; (5) Marks, being a British seaman, and charged and convicted as such, comes within Sec. 267.

We must next refer to an earlier statute, already mentioned. It is the Stat. 12 & 13 Vict., c. 96, which was "an Act to provide for the prosecution and trial in Her Majesty's colonies of offences committed within the jurisdiction of the Admiralty" (passed in 1849 for the colonies, and extended to India, as above mentioned, on the 13th of August 1860, by Stat. 23 & 24 Vict., c. 88), and which enacted, by Sec. 1, that "if any person within any colony shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy, or other offence, of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place where the Admiral or Admirals have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place, shall be brought for trial to any colony, then and in every such case all Magistrates, Justices

of the Peace, Public Prosecutors, Juries, Judges, Courts, Public Officers, and other persons in such colony, shall have and exercise the same jurisdiction and authorities for *inquiring of, trying, hearing, determining, and adjudging* such offences, and they are hereby respectively authorised, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid to trial, and for, and auxiliary to, and consequent upon, the trial of any such person for any such offence whorewith he may be charged as aforesaid, as by the law of such colony would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the Courts of Criminal Justice of such colony." This section, standing alone, might give an impression that as well the substantive law as the procedure law of the colony was to be administered; but the next section speedily removes that impression, so far as the substantive law is concerned. It should also be observed that the Legislature, as well in this first as in the second section, uses, in addition to the expressions "inquire, hear, try, and determine," the word "adjudge."

The second section is: "Sec. 2.—Provided always, and be it enacted, that if any person shall be convicted before any such court of any such offence, such person so convicted shall be subject and liable to, and shall suffer, all such and the same pains, penalties, and forfeitures as by any law or laws now in force persons convicted of the same respectively would be subject and liable to in case such offence had been committed, and were *inquired of, tried, heard, determined, and adjudged*, in England, any law, statute, or usage to the contrary notwithstanding."

This section shows conclusively that the law of punishment prescribed by that statute was the law of England, and no other.

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After that, the Merchant Shipping Act, 1854, already mentioned, was passed. The statute next in order is the Stat. 18 & 19 Vict., c. 91 (passed in 1855 in amendment of the Merchant Shipping Act, and directed to be taken as part of it and construed accordingly—Sec. 1). It enacted, by s. 21, that "If any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbour, or if any person not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is found within the jurisdiction of any Court of Justice in *Her Majesty's dominions* which would have had cognisance of such crime or offence if committed within the limits of its ordinary jurisdiction, such Court shall have jurisdiction to *hear and try* the case as if such crime or offence had been committed within such limits: Provided that nothing contained in this section shall be construed to alter or interfere with the Act (*k*) of the thirteenth year of Her present Majesty, Chapter ninety-six." Here, again, occurs the phrase "Her Majesty's dominions," which must receive the construction given to it by the Merchant Shipping Act, 1854. This enactment, therefore, applies in India. It is an advance upon the Merchant Shipping Act, 1854, Sec. 267, which was confined to masters, seamen, and apprentices. This renders any British subject charged with having committed a crime on board a British ship on the high seas, or in any foreign port, &c., liable to justice in any Court in Her Majesty's dominions which would have cognisance of the crime if committed within the limits of its ordinary jurisdiction. The words are "hear and try" only. The concluding salvo contained in this enactment of the Stat. 12 & 13 Vict., c. 96, shows that the Legislature adhered to its policy that the law of England was to be the law of punishment.

The next statute to be referred to has been already mentioned, Stat. 23 & 24 Vict., c. 88, which received the Royal

(*k*) 12 & 13 Vict., c. 96.

assent on the 13th of August 1860, and extended Stat. 12 & 13 Vict., c. 96, to India.

Upon this state of the law the case of *The Queen* v. *Thompson* (*l*) was decided, on the 3rd of September 1867, by the High Court of Calcutta. It came, on points reserved at the trial by Phear, J., before Peacock, C. J., Phear, J., and Macpherson, J. The charge against the prisoner, Charles Thompson, was, under the Stat. 7 Wm. IV. and 1 Vict., c. 85, s. 2, that he, "on the 25th day of May 1867, on board the British ship or vessel 'Scindia,' upon the high seas, and within the Admiralty jurisdiction of this Court (High Court, Fort William), with a certain knife, feloniously, unlawfully, and maliciously stabbed, cut, and wounded one Edward Ned, with the intent, in so doing, him, the said Edward Ned, thereby then to disable, against the form of the statute in such case made and provided," &c. The jury found the prisoner (under Stat. 14 & 15 Vict., c. 19, s. 5) guilty of "unlawfully wounding" only. The Court held that the procedure adopted was properly the Indian procedure, but that the charge and conviction were properly founded on the English statutes, and that the punishment must be according to English law, Phear, J., concurring with Peacock, C. J., and Macpherson, J., as to the procedure, but doubting "whether the offence should be measured by English law or local law" (*m*). We fully agree with Peacock, C.J., in thinking that the prisoner was there rightly charged and convicted, and was punishable according to English law; and, with Macpherson, J., to that extent. It should be observed that Thompson, not being a master, seaman, or apprentice, did not come within the Merchant Shipping Act, 1854, Sec. 267; and in that respect his case differs from that of Marks, who is charged as having committed the principal offence when a British seaman on board a British ship, and who, therefore, comes within Sec. 267 of the Merchant Shipping Act, 1854. But Thompson, being a British subject,

(*l*) 1 Beng. L. R., Cr. Rul. 1.

(*m*) The extract, made at pp. 9, 10 of the report of that case, from Sec. 21 of the Merchant Shipping Act, 1855 (18 & 19 Vict., c. 91), is inaccurate.

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and having committed the offence on board a British ship, did come within the Stat. 12 & 13 Vict., c. 96, and 23 & 24 Vict., c. 88.

The Stat. 30 & 31 Vict., c. 124, which received the Royal assent on the 21st of August 1867, was not mentioned in *The Queen* v. *Thompson*, and could not have reached Calcutta at the time that case was decided; and even if it had, it could scarcely have applied to an offence committed before that statute became law. Hence there was not any expression of the Court's opinion as to its effect. It made an advance upon the preceding statutes, by rendering not only, as the last of them had done, any British subject, charged with having committed a crime on board a British ship, liable to justice in any Court in Her Majesty's dominions, which would have had cognisance of the crime if committed within the limits of its ordinary jurisdiction, *but also any British subject charged with committing a crime on board any foreign ship to which he does not belong*. That last addition to the law, we are of opinion, was the object of the Legislature in enacting the 11th section. We feel bound by the direction contained in the 1st section of the same Act to construe that statute as though it were part of the Merchant Shipping Act of 1854, and of the Acts passed in amendment of it. There is no recital or evidence of any intention in the Stat. 30 & 31 Vict., c. 124, s. 11, to depart from the well-marked policy of the principal and amending Acts, in prescribing the English law as the substantive law by which cases should be decided. The word "determine" is not, in our opinion, of itself any sufficient indication of such an intention, contrary as it would be to the Merchant Shipping Code, which the principal and amending Acts form. Recollecting that the Stat. 30 & 31 Vict., c. 124, s. 11, applies to all of the colonies as well as to India, we should not feel warranted in giving that phrase any such extensive effect as to substitute throughout Her Majesty's dominions other than the United Kingdom the local law of each colony or province for the law of England.

Sir B. Peacock, C.J., said, with much force, in *The Queen* v. *Thompson*, in speaking of the Stat. 12 & 13 Vict.,

c. 96, "I can well understand that Parliament would prefer to make such person subject to the punishment imposed by English law, rather than by that of the colony. They might not be certain what that law was, or, if aware of it, might not wish to extend it." We think that the Stat. 30 & 31 Vict., c. 124, s. 11, was intended to be merely supplementary, and not antagonistic, to the previous enactments.

It appearing, then, that the English law is the substantive law applicable to the case, we proceed to refer to the statute which, in the course of the argument, it was admitted would be applicable to the case of the destruction of a vessel on the high seas by a British-born subject if the Indian Penal Code were not so. That statute is the 24th & 25th Vict., c. 97 (passed in 1861), which enacted as follows:—

"Sec. 42. Whosoever shall unlawfully and maliciously set fire to, cast away, or in any wise destroy, any ship or vessel, whether the same be complete or in an unfinished state, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

"Sec. 43. Whosoever shall unlawfully and maliciously set fire to, or cast away, or in any wise destroy, any ship or vessel, with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

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These sections make no distinction as to punishment between the destruction of ships by fire and their destruction by other means. To charges framed on each of these sections Marks has pleaded Guilty. Upon a charge framed on the first of them (Sec. 42) Elmstone, Whitwell, and Harriott have been convicted as accessories before the fact to the destruction of the "Aurora." With respect to accessories, Sec. 56 of the same statute enacts that "in the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act puinshable, &c." And here it is important to revert to the Stat. 9 Geo. IV., c. 74, already above mentioned, which was passed expressly with relation to the administration of criminal justice in the East Indies; and (Sec. 1) applied to *all persons* and places, *as well on land as on the high seas,* over whom or which the criminal jurisdiction of any of the Royal Courts erected or to be erected in British India did or should thereafter extend, and the 7th section of which provided that "if any person shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at Common Law, or by virtue of any statute or statutes made *or to be made,* the person so counselling, &c., shall be deemed guilty of felony, and may be indicted as an accessory before the fact to the principal felony," and, further on, provided that "the offence of the person so counselling, procuring, or commanding, howsoever indicted, *may be inquired of, tried, determined, and punished* by any Court which shall have jurisdiction to try the principal felon, *in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed on the high seas,*" &c. This section we have already stated to be in full force, and the result of it, so far as it now calls for notice, is that the offence of Elmstone, Whitwell, and Harriott, as accessories before the fact, may be tried, determined, and punished in the same manner as if that offence had been committed at the same place, namely, on the high seas, where Marks committed the principal offence; and,

inasmuch as persons, who on the high seas are principals or accessories before the fact to the unlawful and malicious destruction of ships, are liable to the punishment prescribed by the Stat. 24 & 25 Vict., c. 97, s. 42, Elmstone, Whitwell, and Harriott are, in our opinion, so liable, as well as Marks, who is also liable under Sec. 43 of the same statute.

For these reasons, we are of opinion that the prisoner Marks is only liable to punishment upon the charges against him, founded upon the English law, to which he has pleaded Guilty; and the prisoners Elmstone, Whitwell, and Harriott are only liable to punishment upon the charge against them, founded upon the English law on which they have been convicted. My brother Bayley, who tried the case, will, previously to passing the sentences on these charges, hear the observations which it has been intimated to us that the prisoners, or their respective counsel on their behalf, desire to make in mitigation of punishment. On all of the charges against the four prisoners, or any of them, founded on the Indian law (*i. e.*, the Acts of the Government of India), on which they stand convicted, we think that judgment should be arrested.

In conclusion, we hope that it may not be deemed presumptuous on our part to say that the Imperial Legislature might, with great advantage to the public, consolidate, and render more clear and easy of access, the present enactments relating to offences committed upon the high seas, and accessories thereto, either on sea or on land. The length of this judgment is in itself a strong testimony to the necessity for such an improvement.

NOTE.—The prisoners Elmstone and Whitwell were sentenced by Mr. Justice Bayley to penal servitude for life; the prisoners Harriott and Marks to penal servitude for fifteen and ten years respectively.

APPENDIX.

Regular Appeal No. 17 *of* 1863.

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March 7.

BAYA'BA'I, widow of Rámákánt Vithal Náik. (*Defendant*) *Appellant.*
BA'LA' urf VENKATESH RA'MA'KA'NT, by his Guardian, Govind Shábu.....(*Plaintiff*) *Respondent.*

Hindú Law—Adoption by Widow—Prohibition by Husband to adopt—Implied Prohibition—Opinion of Devanda Bhatta—Fraud—Concealment from Widow of her Rights.

A Hindú widow has no power to adopt a son to her deceased husband, if she have been expressly prohibited from doing so by her husband in his lifetime.

Whether, according to the Maráthá school, she can adopt without the authority of her husband, given prior to his decease—*Quære.*

Where a Hindú childless husband, when at the point of death, positively refused to adopt a son, and died without retracting that refusal, it was held that a subsequent adoption by his widow was null and void, as authority from her husband to adopt could not in such a case be implied (*per* WESTROPP, J.)

Dictum of the High Court of Madras, "that the opinion of Devanda Bhatta must have been that the assent of the husband stood upon the same footing, and was of the same scope, in the cases of giving and receiving" (a son in adoption by the wife), questioned.

Where an adoption by a young Hindú widow is set up against her, and to defeat her rights, the Court will expect clear evidence that at the time she adopted she was fully informed of those rights, and of the effect of the act of adoption upon them; and if it find that fraud or cajolery was practised upon the widow to induce her to adopt, or that there has been suppression or concealment of facts from her, it will refuse to uphold the adoption.

THE facts of this case are sufficiently stated in the judgment.

Anstey, for the appellant, referred to Mitákshará, Ch. I., Sec. XI., pl. 9, and the note by Golebrooke upon it; Steele's Law and Custom of Caste, pp. 52, 188, 189; Sutherland's Synopsis of the Hindú Law of Adoption, Head I. and *note* vi.; Macnaghten, II. L., Vol. I., pp. 66, 68; Vol. II., pp. 175, 180, 182, 183, 189, 190; I. Strange's Notes of Cases at Madras, 91 (*Veerapermall Pillay* v. *Narain Pillay*); II. *Ibid.* 1, 159 (*Chellummal* v. *Garrow*), per Sir Thomas Strange; S. D. A. Rep. (Morris), Part II., 1, 7.

Vishvanáth Náráyan Mandlik (with whom was *Vishnu Moreshvar*), for the respondent, cited Select Cases S. D. A. (1820 to 1840), pp. 25, 29; 3 Morris S. D. A. Rep., p. 420; 1 Borradaile Rep. 202; 2 Borradaile, pp. 83, 90, 488; Vyavahára Mayúkha, Ch. IV., Sec. V., pl. 17 (Stokes' H. L. Bks., pp. 63, 64); Viramitrodaya, leaf 189, Calcutta edn. of 1815; Dattaka Chandriká, Sec. I.,

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pl. 7, 31, 32; *The Collector of Madura* v. *Rámalinga Sethi*, (2 Mad. H. C. Rep. 206).

March 7. WESTROPP, J.:—This is a regular appeal from the decree of Mr. Walter, late Acting District Judge of Khándesh, pronounced on the 31st of July 1863, whereby he declared the infant plaintiff to be the adopted son of the defendant, Bayábái, allotted to her a maintenance, and required her to account annually for the estate during the minority of the infant, and took certain other steps for the preservation of the estate. The decree also allotted out of the estate a certain annual sum for the support of the infant during his minority.

Rámákánt Vithal, a Bráhman, died on the 26th of September 1861, at the early age of twenty-seven years, leaving surviving him the defendant, his widow, aged only seventeen years, and no issue male or female.

Shortly after the death of Rámákánt, his widow, the defendant, applied for and obtained a certificate of heirship to him, notwithstanding the opposition of her mother-in-law, Chimábái. The latter appealed to the Ṣadr Adálat, but the grant of the certificate was, on the 19th of February 1862, affirmed. It is remarkable that by neither party was the alleged adoption, which is said to have taken place on the 21st of January 1862, mentioned to the Ṣadr Adálat.

Rámákánt carried on business as a shroff under the name of Yádu Manohar. His property, which was chiefly moveable, has, for the purpose of stamping the plaint, been valued by the plaintiff's advisers at Rs. 4,29,125-4-0.

There seems to be reason for believing that, subsequently to the death of Rámákánt, the infant plaintiff, who is alleged to have been adopted, was brought from his father's house and detained and supported for some months in the appellant Bayábái's house, either by her, or some of the male dependants of her late husband. There has been a considerable conflict of oral testimony as to the mode of performance of the alleged ceremony, and as to the assent of the appellant to it.

A deed or other writing of adoption is not indispensable to the validity of an adoption by Hindú law. In *Sootrugun Sutputty* v. *Sabitra Dye* (*a*) Lord Wynford said: "But according to the Hindú law neither registration of the act of adoption, nor any written evidence of that act having been completed, is essential to its validity. It is to be lamented that an irrevocable act, which defeats the just expectations of the relations of deceased persons, may, at any distance of time after it is supposed to have been done,

(*a*) 2 Knapp P. C. C. 290.

be proved by verbal testimony. It would certainly contribute much to the security of property, and the happiness of Hindú families, if in a country where the religious obligation of an oath is unfortunately so little felt, and documents are so readily fabricated, adoptions and all other important acts were required to be perfected in the presence of some magistrate, and recorded in some court." Although a writing be not essential, yet if the existence of such documentary evidence be alleged, but the document itself be not produced, and its absence not satisfactorily accounted for, such circumstances cast some suspicion on the alleged adoption; where the fact of adoption is in controversy, and the oral evidence conflicting.

Evidence was given for the plaintiff to the effect that two deeds relating to the adoption were executed, one by the appellant, Bayábái (for the non-production of which by the respondent no satisfactory excuse was given), and the other by the plaintiff's (respondent's) father, Govind Sháhu, which latter deed is in evidence as exhibit No. 31.

We, perhaps, might have thought it necessary to remand the cause to the court below for the purpose of having further evidence taken, and the appellant herself examined, if we were obliged to dispose of the question as to the fact of a ceremony of adoption having taken place with the apparent assent of the defendant.

But we do not think it necessary to determine whether a ceremony did so take place, or whether the form of such ceremony was proper; because we have arrived at the conclusion that, even if a suitable ceremony of adoption were performed, and with the apparent assent of the defendant, yet such adoption was wholly invalid, and cannot stand.

In one reason for holding the adoption to be invalid my brothers Tucker and Warden concur with me. That alone, therefore, will be sufficient to rule this case.

But for another reason also I hold the adoption to be invalid. I shall begin by mentioning that reason.

It is, that Rámákánt, the husband of the appellant, when at the point of death, positively refused to adopt a son.

This refusal to adopt was deposed to by witnesses on both sides, who concurred in saying that he more than once refused to adopt. Some of them spoke of what Rámákánt said on the day preceding his death, and others of what he said on the day of his death, and on both occasions, in reply to suggestions made to him by his friends that he should adopt a son, he refused to do so. Amongst those witnesses were the three following:—Pándu Báláji was examined on behalf of the infant plaintiff, to whom on most other points

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his testimony was favourable, and there is not any reason for suspecting him of bias in favour of the defendant, Bayábái. On cross-examination he said: "I went to see Rámákánt on the day before his death. People said to him 'Adopt some one;' he replied 'No, I have a wife.'" Váman Bálkrishna, a witness examined on behalf of Bayábái, said: "Rámákánt said that he did not wish to adopt." Lakshuman Sadáshiv, a witness examined on behalf of Bayábái, said: "I saw Rámákánt; he said 'I don't wish to adopt, I have a wife.'"

The Judge of the District Court does not appear to have raised or considered the question as to the legal effect of Rámákánt's refusal to adopt, but does observe that "there is no reason, from the evidence, to suppose that she" (Bayábái) "acted by order of her deceased husband" in making the adoption; and at the opening of his judgment he said that, on the exposition of the Hindú law officer, it "is clear that a Hindú widow can adopt, either in pursuance of the orders of her deceased husband, or of her own accord." However, the District Judge omitted to notice that there was here not only an absence of a direction or recommendation by the husband to the widow to adopt, but also a positive refusal by him, when *in articulo mortis*, to do so.

The doctrine of the Hindú law officer of the District Court, contained in the dictum of the learned Judge, that "a Hindú widow can adopt, either in pursuance of the orders of her deceased husband, or of her own accord," although it may perhaps be sustainable in this Presidency, or in those parts of it in which the Maráthá school of law is in the ascendant, and in Southern India, does not prevail throughout Hindustán, and in this Presidency it has been frequently disputed—so frequently that during my experience of the Sadr Adálat and Supreme Court the power of the widow to adopt without the express authority of her husband has been invariably a matter of controversy between the parties in cases of adoption by the widow which have come before those courts. The present case is no exception. Mr. Anstey, in his argument for the appellant, strenuously contended that, without express authority from her husband, a Hindú widow could not in this Presidency make a valid adoption. It is, however, unnecessary now to give any decided opinion on that point, because, assuming that a widow have power to adopt, without any express authority from her husband to that effect, yet if he when dying, but in the full possession of his intellect, then distinctly refuse to adopt, and die without in any wise retracting that refusal, as was the case here with Rámákánt, I cannot doubt that a subsequent adoption by the widow would be void and of no effect. In stating the grounds of that view, I must examine the authorities on which the right of a

widow to adopt without express authority has been debated, although not at present proposing to give any positive opinion upon that controversy.

That the ground for adoption amongst Hindús rests upon the religious necessity for having a son, in order to deliver the adoptive father from *Put*, is a point beyond dispute (Manu, Ch. IX., pl. 137, 138) (*b*), although some question has been made whether the mere birth or acquisition of a son is of itself, independently of the performance of funeral ceremonies, sufficient to effect that deliverance (*c*), a point into which there is no present necessity to inquire.

But adoption is a right, not a duty to be enforced by the civil power. "No good Hindú lawyer," adds Sir T. Strange, "sitting in any of the King's or Company's courts in India, would listen for a moment to an application to compel a childless Hindú to adopt—succession to his property being at all events provided for, whether he have a son to inherit it or not:" 1 Strange H. L. 76. Adoption is by Hindú jurists recommended, not enjoined (2 Stra. H. L. 83, remark by Colebrooke).

Manu, in the case of persons of low caste, recognises the ancient law which gave a right to the husband, who is childless, to authorise the wife to effect the procreation of a son by a brother of the husband duly appointed for the purpose (*d*), and denounces as illegal such a proceeding amongst the twice-born classes (*e*). He does not appear to contemplate adoption by a widow under any circumstances (*f*).

Vasishṭha, one of the Smṛiti writers mentioned by Mr. Steele in his list of authorities accepted in Khándesh (*g*), whence this case comes, says: "Let not a woman either give or receive a son in adoption unless with the assent of her husband" (*h*). We shall subsequently see what efforts have been made by certain schools to explain away this text.

The Mithila school adopted, to the fullest extent, the doctrine of Vasishṭha. Vachespati Misra, one of the principal expositors of

(*b*) And see 3 Jagannátha's Digest by Colebrooke, pl. cccii to cccxiii.

(*c*) 1 Mad. H. C. Rep. 57, *per* Scotland, C.J.; Strange's Manual 51; Manu, Ch. IX., pl. 106, 107; Dattaka Mímamsá, Sec. I., pl. 4, 13, 14, 36, *et seq.*, 52, 55, 56, 61; and Sutherland's Preface, first three lines; Dattaka Chandriká, Sec. I., pl. 4, 5, 6; Sutherland's Synopsis, Head I.

(*d*) Ch. IX., pl. 59, 63, 145, 146, 159, 190; and see pl. 58, 143, 144, 147, 148, 162, 164, 165, 167; and see 2 Stra. H. L. 137, 164, 201, 203.

(*e*) *Ibid.*, pl. 64, 68; Miták., Ch. II., Sec. I., pl. 18.

(*f*) Acc. 1 Stra. Notes of Cases at Madras, p. 119.

(*g*) As "Wusisht," Steele's Summary, p. 25.

(*h*) Vásishṭha 15, 4; 3 Jagannátha's Digest by Colebrooke, Bk. V., Ch. IV., para. cclxxiii.; Dattaka Mímamsá, Sec. I., Cl. 15.

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that school, denies that a woman can adopt otherwise than in association with her husband (*i*).

The Mitákshará, which stands, under the name Whyuwar Widyaneswuree, at the head of Mr. Steele's list (*j*) of compilations of authority in Khándesh, preserves a complete silence as to the power of a widow to adopt, but recognises her right to give in adoption. The passage, when purged of the interpolations obtained from the commentatrix Bálambhaṭṭa, runs thus: "He who is given by his mother, with her husband's consent, while her husband is absent or after her husband's decease, or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his given son (dattaka). So Manu declares: 'He is called a son given (dattrima) whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress, confirming the gift with water'" (*k*). Vijñánes'vara, the author of the Mitákshará, in the other parts of the same section containing his views on adoption, relies for the most part on Vasishṭha and Manu. Mr. Colebrooke's note on the passage which has now been quoted from the Mitákshará, after referring to the mother's authority to give away her son when she is a widow, is as follows: "In regard to a widow's power of adopting a son there is much diversity of opinions. Vachespati Misra, who is followed by the Maithila school, maintains that neither a woman nor a S'údra can adopt a dattaka or given son: because the prescribed ceremony includes a sacrifice, which they are incapable of performing. This difficulty may be obviated by admitting a substitute for the performance of that ceremony: and, accordingly, adoption by a woman, under an authority from her husband, is allowed by writers of the other schools of law. Nandá Paṇḍita, however, in his treatise on adoption, restricts this to the case of a woman whose husband is living, since a widow cannot, he observes, have her husband's sanction to the acceptance of a son. On the other hand, Bálambhaṭṭa contends that a woman's right of adopting, as well as of giving, a son, is common to the widow and to the wife. This also is the opinion of the author of the Vyavahára Mayúkha, but while he admits that a widow may adopt a son without her husband's previous authority, he requires that she should have the express sanction of his kindred. Writers of the Gaura (Bengal) school, on the contrary, insist on a formal permission from the husband, declared in his lifetime." As to Bálambhaṭṭa, I should here observe that her name is not to be found in the list of authorities

(*i*) Vivada Chintámaṇi, translated by Prossono Coomar Tagore, pp. 74, 75.
(*j*) Steele's Summary, p. 26. (*k*) Miták., Ch. I., Sec. XI., pl. 9.

in Khándesh published by Mr. Steele (*l*), and is expressly stated by him (*m*) to be omitted in the Puṇá catalogue. Her authority does not stand high in this Presidency, and her doctrines have the reputation of generally inclining in favour of her own sex.

It is remarkable that the Dattaka Chandriká is not mentioned in the Puṇá or Khándesh catalogues of authorities given by Mr. Steele in his Summary. In Mr. Borradaile's preface to the Vyavahára Mayúkha he states that neither it nor the Dattaka Mímamsá exists in this Presidency; but as regards the Dattaka Mímamsá at least he appears to have been misinformed, as will presently appear.

Mr. Sutherland, in his preface to the Dattaka Mímamsá and Dattaka Chandriká, says of the Dattaka Chandriká that it is a more concise work than the Dattaka Mímamsá, and was written by Devanda Bhaṭṭa, the author of an eminent compilation of law, the Smṛiti Chandriká. The Dattaka Chandriká, he says, is a work of authority, and supposed to have been the groundwork of Nandá Pandita's Dattaka Mímamsá, the doctrines of the two books varying on some points. Mr. Sutherland continues: "Of the Smṛiti Chandriká of Devanda Bhaṭṭa, Mr. Colebrooke observes: 'This excellent treatise of judicature is of great and almost paramount authority, as I am informed, in the countries occupied by the Hindú nations of Dravira, Tailinga, and Carnáṭa, inhabiting the greatest part of the peninsula or Dakhaṇ. It is not unlikely that the Dattaka Chandriká may have attained equal distinction."

Commenting on the passage of Atri: "By a man destitute of male issue only must the substitute for a son, of some one description, always be anxiously adopted, for the sake of the funeral cake, water, and solemn rites," and on the similar text in Manu, the author of the Dattaka Chandriká, in Sec. I., pl. 7, says: "Women, with the sanction of their husbands, are competent to adopt, as Vasishṭha shows: 'Let not a woman either give or receive a son in adoption, unless with the assent of her husband.'" And at pl. 24 he says: "So also in the case in question, the affiliation of a son by a woman *proceeding legally with the sanction of her husband*, to constitute for him male issue, only takes place where no son of that person may exist: but if he have any, although she may be destitute of the same, such adoption does not obtain, for to proceed therein would be unproductive of the object." Speaking of the giving of sons in adoption, he says at pl. 31: 'But by a woman the gift may be made with her husband's sanction if he be alive; or even without it if he be dead, have emigrated, or entered a religious order;" and then he requotes the same text

(*l*) 1st ed., pp. 25, 26; 2nd ed., pp. 19, 20.
(*m*) 1st ed., p. 25; 2nd ed., p. 19.

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from Vasishṭha. At pl. 32 he continues: "Now if there be no prohibition even, there is assent; on account of the maxim: 'The intention of another not prohibited is sanctioned.' Yájñavalkya suggests the independency of the woman: 'He whom his father or mother gives is a son given.' Also in another place, 'deserted by his father or mother, or either of them.' "

In the very able judgment in *The Collector of Madura* v. *M. Ramalinga Sethupati* (*n*) the High Court of Madras supposes that Devanda Bhaṭṭa would have put the same construction upon the passage of Vasishṭha as to receiving a son in adoption as he did with regard to giving a son in adoption. It is said: "The proper conclusion seems to be that the opinion of Devanda Bhaṭṭa must have been that the assent of the husband stood upon precisely the same footing, and was of the same scope, in the cases of giving and receiving, for if the words of Vasishṭha require this explanation in the one case, they require it in the other."

After a careful consideration of the remarks of the High Court of Madras, and with all due respect to the note at page 68, 1 Macn. H. L., I think that Devanda Bhaṭṭa ought not to be held responsible for anything more than he actually did say. The two placita immediately preceding pl. 31 and 32, above quoted from the Dattaka Chandriká, show that he was there dealing with the case of giving only. They are these: "29. In answer to the question by whom is a son to be *given?* Caunaka declares: 'By no man having an only son is the gift of a son to be ever made. By a man having several sons, such *gift* is to be anxiously made.'" "30. The author, apprehending an extinction of lineage in case of the *gift* of a son by one even having two sons, says, 'by one having several sons.'" The 4th and 7th placita of the same section (1), referred to in the judgment of the Madras High Court, do not seem to support the conclusion to which it came as to the views of Devanda Bhaṭṭa. On the contrary, the concluding portion of the 7th plac.:—'Women, with the sanction of their husbands, are competent to adopt, as Vasishṭha shows: 'Let not a woman either give or receive a son in adoption, unless with the assent of her husband,' where Devanda Bhaṭṭa treats of the competency of a woman to take in adoption,—furnished him with a suitable opportunity to express, if he entertained it, the opinion attributed to him by the High Court of Madras. The fact that he not only carefully refrained from giving utterance to such a doctrine, but, when again, in plac. 24 of the same section, he touches upon receiving in adoption by a woman, he says, as already above mentioned: "So also, in the case in question, the affiliation of a son, by a woman *proceeding legally with the sanction of her*

husband, to constitute for him male issue, only takes place where no son of that person may exist," and thus treats the husband's sanction as necessary to the taking in adoption; and the further fact that, in the passage quoted by that court from the Smriti Chandriká (viz., "The objector says that the gift of a son by his mother is not proper, notwithstanding her power. The reason of this is her want of independence. Refutation:—True, but it is right if it be authorised by an independent male. Hence only Vasishtha says: 'No woman shall give or receive a son unless with the permission of her husband.")the same learned commentator (Devanda Bhatta) exhibited the like abstinence, lead strongly to the conclusion that his intention was to expand the text of Vasishtha only so far as it related to the giving of a son (*o*). I should say that Devanda Bhatta is doubly entitled to the benefit of the rule *expressio unius est exclusio alterius*, he having twice expressed himself in favour of the expansion of the text of Vasishtha in the case of a woman giving a son, and preserved a rigid silence on each occasion as to any such expansion being proper in the case of a woman taking a son in adoption. His glosses upon that text are open to this further—and, I humbly conceive, conclusive—remark, that throughout them he avoids making any distinction between a wife and a widow, and if those glosses be intended to comprise as well the taking as the giving in adoption, he must be considered as sanctioning a taking in adoption, without the authority of her husband, by a wife as well as by a widow: for his remarks as to giving in adoption include both wife and widow; whereas no Hindú jurist of high reputation has, so far as I can discover, ever affirmed that a wife may, without the authority of her husband, take a son in adoption. It is vehemently improbable that Devanda Bhatta would have gone to such a length. Had he done so, the result of his comments would, instead of an explanation, have been a complete contradiction of Vasishtha's text—an intention which, without very clear proof, ought not to be attributed to the commentator, and which he was not likely to leave to mere implication. Assuming, however, that my view of the meaning of Devanda Bhatta is not well founded, it must be remembered that his work, the Dattaka Chandriká, though it may rank higher in the Dravida country than the Dattaka Mímamsá of Nandá Pandita, is inferior in authority to the latter in Mahárashtra, and in cases of conflict does

(*n*) 2 Mad. H. C. Rep. 206, 219, 220.

(*o*) See the Commentary on Chandes'wara, 3 Jagannátha's Dig. 257, Colebr. Trans., to the effect that "if the father be living, a mother can only make a gift with his assent, but if he be not living, she may do so even without his previous consent;" but the same commentator lays down clearly that the widow cannot *take* in adoption without her husband's assent: *Ibid.* 253, and *infrà*, p. xii., xiii.

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not there prevail against it, except when supported by other authorities of high standing, *which is in such instances of difference sometimes the case.* Of the Dattaka Mímaṁsá, Mr. Sutherland, in the preface (p. ii., 1st ed.; p. 527 Stokes' ed.) to his translations of it and of the Dattaka Chandriká, says that "The Dattaka Mimamsa is the most celebrated work extant on the Hindú law of adoption." Mr. Colebrooke, in his letter to Sir John Royds, printed at pp. 132, 133, of Vol. II. Stra. II. L., says: "The Datta Mimansa is, no doubt, the best treatise on Hindú adoption" (*p*). It appears to be included in the Puṇá catalogue of authorities printed by Mr. Steele (*q*), though somewhat disguised in spelling as "Dut Meemans," and is stated by him to be a work well known in the Carnatic country, but neither the Dattaka Chandriká nor the Smṛiti Chandriká is included in the Puṇá or the Khándesh catalogue, and the omission of the lastmentioned work is noticed by Mr. Steele (*r*). In Maháráshṭra, however, both the Dattaka Mímaṁsá and the Dattaka Chandriká must yield in authority to the Mitákshará, and generally also to the Vyavahára Mayúkha.

In the Dattaka Mímaṁsá, in the course of a long exposition of the abovementioned text of the Smṛiti writer Atri: "By a man destitute of a son only must a substitute for the same always be adopted; with some one resource (yasmát tasmát prayatnatas) for the sake of the funeral cake, water, and solemn rites," Nandá Pandita observes (*s*): "15. 'By a man destitute of a son.' From the masculine gender being here used, it follows that a woman is incompetent (to adopt). Accordingly Vasishṭha ordains: 'Let not a woman either give or receive a son in adoption unless with the assent of her husband.' "16. From this the incompetency of the widow is deduced, since the assent of her husband is impossible." 17. "Nor should it be argued that the assent of a husband is requisite for a woman whose husband is living because she is subject to control, but not so the widow: for, mention being made of woman in general, dependency on control is not the cause; and (were it) her subjection to the control of kinsmen exists, as shown in the following text, 'on default of these the kinsmen,' &c." Mr. Sutherland, in his annotation on that section, points out that the text alluded to by Nandá Pandita is that of Yájñavalkya: "The father protects her when a damsel. The husband when married: sons in old age: on default of these, kinsmen. A female

(*p*) See also Colebrooke's Preface to the Dáyá Bhága and Miták., and Stokes' H. L. B., p. 177.

(*q*) p. 22, 1st ed.; p. 18, 2nd ed.

(*r*) pp. 24, 25, 1st ed.; p. 19, 2nd ed.

(*s*) Dattaka Mímaṁsá, Sec. I., plac. 15, 16, 17, 18.

attains not independence" (*t*). Nandá Pandita carries yet further than shown by the passages already quoted the disability of the widow; he says: "18. If it is contended, then, that she may adopt a son, with the assent of the kinsmen even, it is wrong; for the term husband would become indefinite; and the purpose would not be attained. Now the purpose of the husband's sanction is that the filiation, as son of the husband, may be complete even by means of an adoption made by the wife." He also, in speaking, as I understand him, of an adoption by the wife with the permission of the husband (the only adoption by her which Nandá Pandita recognises), says: "Now the connexion of lineage to the father is the filiation as his son; and such filiation proceeds from the sanction only of the father, not from the act of adoption: for the agent of that, in this instance, is the wife" (*u*). At plac. 28 he reiterates his opinion as to the disability of the widow: "28. Besides, this part of the text, 'unless with the assent of her husband,' is an exceptive exemption from the general prohibition contained in the part preceding: 'Let not a woman either give or accept a son,' and in it the assent of the husband is the cause. Therefore the widow is incompetent (to adopt): for her husband being dead, since his assent is impossible, the exemption destitute of the cause (to give it effect) is without validity; *and other* means of deducing (her authority,) are wanting. Thus the doctrine of every writer is rendered even consistent."

In his account of the different schools of law, furnished by Mr. Colebrooke to Sir T. Strange, Mr. Colebrooke says: "In the west of India, and particularly among the Mahrattas, the greatest authority after the Mitákshará is Nílakámṭha, author of the Vyavahára Mayúkha and of other treatises bearing the same title" (*v*). It stands second to the Mitákshará in the list of authorities accepted in Khándesh given by Mr. Steele in his Summary. He, writing in 1827, says it was "composed about 300 years ago; it is of chief notoriety in the Carnatic, though attended to both at Poona and Benares" (*w*).

At plac. 16, Ch. IV., Sec. V., of the Vyavahára Mayúkha the author quotes the passage of Vasishṭha which has been so frequently mentioned, and at plac. 17 proceeds thus: "Therefore, if there must be an order from the husband, it is for a married woman only, as above shown; but for a widow, even without it, (adoption) may be made,

(*t*) Acc. Manu, Ch. IX., pl. 3.

(*u*) Dattaka Mímamsá, Sec. I., pl. 19; and see pl. 22.

(*v*) 1 Stra. H. L. 318; and see Colebrooke's Preface to the Miták. (Stokes, H. L. B. 173); and see *Vináyak Anandráv* v. *Lakshmibái*, 1 Bom. H. C. Rep., 122, 124, 127.

(*w*) Steele's Summary, p. 7, and see his Preface, p. vi.

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with the permission of her father, or, on failure of him, of the relation (*nyati*) under this precept: 'Let a female be taken care of by her father while a child, by her husband when married, and by her sons in her old age. If none of these exist, let her other relations take care of her. A woman is never fit for independence.' This has been declared by Yájñavalkya only with reference to difference of age, and the circumstances of a woman being under the power of her husband. In case of his being dead, or unable, from old age or other disqualification, or from helplessness, then she is indeed under the power of her sons or other relatives." Pl. 18. "By Katyáyana also it has been said: 'If a woman, without the orders of her father, husband, or son, should perform obsequies, such obsequies are of doubtful validity.' What is here said of the orders of her father, husband, &c., relates only to the difference of age. Obsequies here means rites performed for the other world; wherefore, at whatever age a married woman may (require to) receive the command of her husband, that very command is, in the case of a widow, not required, since the command of any other person not here mentioned is nowhere declared requisite. Therefore, the right of adoption, even without the order of her (late) husband, does pertain to a widow."

"Even without the order of her late husband" does not include a case in which the husband has indicated his pleasure to be that there shall not be an adoption. If he die silent, then indeed, in the opinion of Nilákantha, as shown by this passage, the widow may adopt, albeit without any express order of her husband, verbal or in writing, enjoining her so to do.

Mr. Raymond West, our learned and able Registrar, who, in conjunction with Professor Bühler, is engaged in making, on behalf of Government, a compilation or digest of the Hindú Law, as exemplified in the responsa of Shástris, has kindly furnished me with the following valuable note, made by him in the pursuit of his task:—

"On the subject of adoption by a widow three doctrines have been maintained by Hindú lawyers.

"(1.) Nandá Pandita in the Datta Mîmaṁsâ contends that a woman cannot adopt without the express command of her husband, because the passages on adoption speak of the adopter only in the masculine, because a woman is not allowed to recite the passages of the Veda required at the ceremony, and because a passage of Vasishtha expressly declares that a woman cannot adopt without directions from her husband (which after his death he cannot give). He argues against an interpretation of this passage founded on the word bharta (husband) which translates it as 'keeper', and would thus extend the right of granting permission to the guardians of the widow.

"(2). Against this, Nîlakaṇṭha, in the Vyavahâra Mayûkha, contends that the passage refers to married women under coverture only, not to widows; and he maintains that a widow may adopt without her husband's express permission, if authorised by the male relations under whose protection she lives, but not otherwise: because if a woman performs even funeral ceremonies without the consent of her father, husband, or son, a passage of Katyáyaṇa declares that they are wholly inefficacious.

"Kamalakara, the author of the Nirṇayasindhu (*x*), explains the passage of Vasishṭha in the same way as Nîlakaṇṭha, and from a verse which occurs in Vatsa as well as in Manu, asserting that a mother, as well as a father, may give away a son, infers that she may also receive a son in adoption.

"(3). In the Sanwaskara, Kaustubha, and Dharmasindhu (*y*) it is maintained that the language of the ancient Smṛitis is such as will include women also amongst those entitled to adopt, and that the permission of relatives is no more necessary for this than for other religious acts, which a woman, though dependent, and subject to control when she is inclined to do wrong, may perform without permission, and even against the consent of her guardians.

"This last doctrine has been very generally adopted on this side of India, especially since the establishment of the British rule made extension of the power of adoption dear to the natives, both as a national distinction, and as a means of enrichment at the expense of the State, but it proceeds on a confusion of the civil and religious effects of the widow's acts, which is unauthorised by analogy, and is quite opposed to the general tenor of the Hindú law-books as to the status and capacity of women. As to the language of the Smṛitis, though the masculine, which is uniformly employed, may, according to the construction of the Sanskṛit language, include females also, yet the general correspondence of the passages relied on, with others in which no doubt has ever been entertained that men only are intended, leaves no reasonable doubt that it was not intended to extend the right to females. Had this indeed been intended, it is impossible to conceive that a matter of such importance should not have been expressly provided for, instead of being left to a mere (and somewhat obscure) grammatical inference. The interpretation of Nîlakaṇṭha is met by the remark that a broader view of Vasishṭha shows that he did not intend to treat of adoption

(*x*) Stated in 1827 by Steele (p. 10) to have been then written 214 years.

(*y*) Stated in Steele (p. 10) to have been then (1827) written about half a century.

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after the father's death at all; it was a case which (apparently) he did not contemplate."

There is much force in these remarks of Mr. West, and there unquestionably is good reason to believe that the doctrine of Nílakantha, repeated and expanded in other works referred to by Mr. West, is a deviation from the ancient and strict rule of Hindú law, enunciated in its simplicity by Vasishtha, and still maintained in Mithilá, Bengal, and Benáres, and some other parts of India. Neither Manu, nor the Mitákshará, nor the Dattaka Mímaṁsá, nor, if I be right in my interpretation of him, Devanda Bhatta in the Dattaka Chandriká, countenances the laxity of Nílakantha, and his Maráthá school, in maintaining that a widow needs no express authority from her husband to adopt.

That in order to give validity to her adoption she needs such an authority where the Benáres, Bengal, and Mithilá schools prevail, is beyond doubt: *Raja Shum Shere Mull* v. *Ranee Dilraj Konwar* (*z*) from Goruckpore; *Mt. Tara Munee Dibia* v. *Dev Narayen Rai* (*a*), from Dacca; Anonymous (*b*); *Jai Ram Dhami* v. *Musan Dhami* (*c*), from Behár; *Raja Haiman Chull Singh* v. *Koomer Gunsheam Singh* (*d*), from Etawah; *Huradun Mookurjia* v. *Muthoranath Mookurjia* (*e*); *Chundermonee Debia Chowdhoorayn* v. *Munnobhunee Debia* (*f*).

In the following passage in 1 Stra. H. L. 79, 80: "The assent of the husband may be given to take effect (like a will) after his death; and, according to the doctrine of the Benáres and Maháráshtra schools prevailing in the peninsula, it may be supplied by that of his kindred, her natural guardians, but it is otherwise by the law that governs the Bengal Provinces," the Benáres school seems to have been introduced by mistake. In *Raja Haiman Chull Singh* v. *Koomer Gunsheam Singh* (above mentioned),—Mr. Justice James Parke, in giving the judgment of the Privy Council, says (*g*): "According to the Native text-writers, it seems to be clear that the ancient law of Hindostan required the authority of the husband; but it is also clear that the strictness of that law has been, in many districts, relaxed, or modified by local usage; and the opinion of the Shastris, as published in Mr. Borradaile's Bombay Reports, is very strong to show that in the Mahratta States, to the west of the Peninsula, the law does not require any such authority to render the act valid. But that such relaxation has extended to this particular district (Etawah) is not in their Lordships' judgments established;

(*z*) 2 Macn. S. D. A. Rep. 169. (*a*) 3 Macn. S. D. A. Rep. 387.
(*b*) East's Notes X.; 2 Morley Dig. 16. (*c*) 5 S. D. A. Rep. 3.
(*d*) 2 Knapp P. C. C. 203. (*e*) 4 Moo. Ind. App. 414, 426.
(*f*) 8 Moo. Ind. App. 477.

on the contrary, the weight of authority is in favour of the opposite conclusion." In a Calcutta case, *Srimati Rajcoomaree Dossee* v. *Nobocoomar Mullick* (*h*), in which it was held that where a widow, who is heiress in possession of her deceased husband's estate, claims to have a power of adoption, the court will not establish that power against the reversionary heirs of the deceased husband's estate before an adoption, Colville, C.J., said: "Even if it be granted that a person, merely because he is a dattaka or son given, apart from the performance of any further ceremony, becomes incapable of returning to his natural family, that rule would not govern the case of an adoption that was invalid because the widow had not power to adopt. For to constitute a dattaka there must be both gift and acceptance. *A widow cannot accept a son for her husband unless she is duly empowered to do so*; and, therefore, her want of authority, if it invalidates the adoption, also invalidates the gift" (*i*). Commenting on the already-cited text of Vasishtha, Jagannáth Tercapanchánana, in his Digest (*j*), says: "If a son be accepted by a wife without the assent of her husband, her property in that child is valid, but not his performance of filial duties; he can neither possess the heritage, nor offer the Shráddha or the like, for it is shown that the adoption of a son is the act of the man; in no code of the law is it found that adoption can be the act of the woman." And again (*k*): "Accordingly, a widow, though she may perform acts of religion without consent previously declared by her deceased lord, cannot, *without such consent*, adopt a son given, for the text of Vasishtha expresses: 'Let not a woman give or accept a son,' &c. (cclxxiii.). But if her husband assented, she may adopt a son given, as a son of the wife *is raised up to a husband by his consent*, else it should have been expressed in the law: 'he shall not be the son of her husband unless adopted with the assent of her lord, but shall be her own son to perform her obsequies and take her inheritance.' *A son given is, therefore, the child, not of his adoptive mother, but of his adoptive father only.*" And see W. H. Macnaghten, H. L., Vol. I., pp. 66, 68; Vol. II., pp. 175, 180, 182, 183, 189, 190; 1 Stra. Notes of Cases at Madras, 121.

As to the extent of the deviation in Maháráshtra there is a contest. Some authorities maintain that if the husband have died without having authorised his wife to adopt, she may adopt on obtaining the assent of his kindred or of the caste. Others contend that she may adopt without the consent either of the relatives of her husband or of the caste.

(*g*) 2 Knapp, P. C. C., p. 221. (*h*) Boulnois R. 137. (*i*) *Ibid.* 143, 144.

(*j*) Vol. 3, Colebr. Trans., p. 244. As to his authority see 1 Stra. H. L., preface xviii.; 2 *Ibid.* 175, 176 (Colebrooke's Letter).

(*k*) *Ibid.*, p. 253.

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Steele (*l*) speaks of the necessity of the consent of the husband Sapiṇḍa relations, or caste, and in this, so far as regards the caste, he would appear to follow the doctrine laid down by the Shástris in *Sri Brijbhookanji Maharar* v. *Sri Gokooloosaoji Maharar* (*m*); but, for the right of the caste to intervene, there does not seem to be any respectable authority. In order to attempt to support their doctrine on that point, the Shástris seem to have mistranslated the word "Nyati" in the Mayúkha as "caste," its proper meaning appearing to be Sapiṇḍas, or gentile kindred (*n*).

Of the nine Shástris who gave opinions in *Hurbut Rao Mankur* v. *Govindrao Bulwunt Rao Mankur* (*o*), only one, Harbhaṭ Kásikar, mentioned the consent of the relatives or of the caste, and he did not treat such consent as indispensable. All nine were of opinion that the widow might, according to the Maráṭhá school, adopt without the order of her husband. Báji Ráv, the last of the Peshwás, as a general rule, treated adoptions by widows without the order of their husbands as illegal. But it is certain that he was swayed by interested motives (*p*). By an intrigue of Bállobá Tátyá and Parashrám Bháu Paṭvardhan, Yeswadábái, the widow of Mahádev Ráv Sivái, the preceding Peshwá, had been induced to adopt Báji Ráv's brother, Chimṇaji A'ppá, very much against the will of the latter. Eventually, after Báji Ráv had, on the 4th of December 1796, taken his seat on the *masnad* as Peshwá, it was declared by a council of Shástris that the relationship between the late Peshwá, Mahádev Ráv Sivái, and the sons of Raghunáth Ráv (Báji Ráv and Chimṇáji A'ppá) prevented the widow of Mahádev Ráv from adopting the second cousin of his father; the adoption was declared illegal, and annulled. The Shástris who had performed the ceremony were expelled. Chimṇáji A'ppá, though he had acted on compulsion, was compelled to undergo penance in atonement for the deed, but was soon afterwards restored to the favour of his brother (*q*). Báji Ráv himself rested the invalidity of the adoption on the ground that the widow had not express authority from her husband to adopt. The disapprobation which the deviation of the Maráṭhá school met with in such high quarters may to some extent account for the fact that, for a long time afterwards, and down even to the hearing of this case, we find that adoptions by widows without express authority from their husbands have been constantly and

(*l*) 1st ed., p. 54, para. 45; but see Appx., pp. 32 *et seq.*, 37, 177, 188, and 189; 2nd ed., pp. 47, 48, 175, 176, 187, 390, 391 *et seq.*

(*m*) 1 Borr. Rep. (2nd ed.), pp. 202, 214, and 216. And *see* 2 *Ibid.* 492, 493.

(*n*) See note 6, 2 Borr. Rep. (2nd ed.), pp. 492, 493.

(*o*) 2 Borr. Rep., p. 83, 104 (2nd ed.). (*p*) 2 Borr. Rep. (2nd ed.), p. 101.

(*q*) 3 Grant Duff's Hist. Mahr. 93, 95, 102, Bombay reprint.

vigorously contested, but, it must be admitted, generally speaking, without success, unless there were some other defect in the adoption than the absence of express authority from the husband. In support of the widow's right to adopt in Maháráshṭra and the Peninsula are 2 Stra. II. L. 92, 96, 115 (but with the consent of the husband's relations), also the cases already cited from Borradaile's Reports, and the following authorities: the Shástri's opinion in *Bhasker Bachaji* v. *Naru Ragunath* (*r*); *Virbudr Haribudr* v. *Baee Ranee* (*s*), which was a strongly contested case in the Núgar Bráhman caste, in which the Súrat Shástri seemed to regard the consent of relations as necessary, but the Bombay Ṣadr Diváṇi Adálat Shástri was silent as to any such necessity; *Abajee Denkur* v. *Gungadhur Vasudeo Gosaee* (*t*), also a strongly-contested case. It seems to have been an adoption by a widow, in the last moments of her life, without the consent of her husband's relatives. Mr. Frere, one of the Judges, notices, and apparently adopts the view, that there is not any necessity for the consent of kindred (*u*), and such would appear to have been the decision of the court. Mr. Harrison's doubts seem to have rested on the delay in the adoption. In the unreported case *Gopal Shridhar Dikshit Patvardhan* v. *Náro Vináyak Dikshit Patvardhan* (Sp. App. 369 of 1865),* the consent of one of two kinsmen was held by Newton and Janárdhan Vásudev, JJ., to be sufficient to an adoption by a widow, although the dissenting kinsman was in possession of the major portion of the property of the deceased.

Assuming, but not deciding, that the deviation of the Maráṭhá school is established to the furthest extent to which any of the foregoing authorities reach (namely, that the widow may, without express authority or order from her husband, and without the consent either of his or her relations, adopt a son), and without in the least degree wishing or intending to infringe on the law of adoption by a widow so far as it can be considered as established in Maháráshṭra, cherished as I believe that law to be by the Hindú community, or a very considerable proportion of it, yet I am not disposed to extend it, or to depart from the general Hindú law one single step further than provincial or local usage has firmly settled as admissible. And I have not any doubt that we should extend it much beyond its present boundaries, were we to hold that the widow may adopt where the husband has, when perfectly in the possession of his senses, as well on the day preceding his death, as on the day of his death, in reply to suggestions that he should adopt a son, positively refused so to do.

(*r*) Bombay Select S. D. A. Cases, 25, 31.
(*s*) S. D. A. Rep., Morris, Part II., 1, 3, 7. (*t*) 3 Morris' Rep. 420.
(*u*) *Ibid.*, 427, 428. * See *post*, p. xxiv.

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Some of the strongest advocates of the widow's right to adopt admit that if the husband have signified his desire to be that there should not be an adoption, the widow cannot adopt. In 2 Borr. Rep. 104, Chintáman Shástri Dikshít A'pte says: "The widow should adopt with her husband's order, but she may adopt without it, *provided her husband did not say he wished to have no son adopted.*" It will be observed he does not require an express prohibition, but regards an intimation of the husband's wish, that there should not be an adoption, as sufficient. In the Nágar Bráhman case already mentioned, the question put to the Shástri of the Bombay Sadr Diváni Adálat was: "Can a widow of the Nágar Bráhman caste adopt a son without having obtained the permission of her husband?" To which the Shástri replied: "*If the husband forbade the adoption of a son, the widow could not adopt;* but if he did not prohibit it, it must be understood that he assented to it. For it is commanded in the Shástr that a person who has no male issue must adopt a son, and if the widow adopted under such circumstances, in the way required by the Shástr, her act would be valid. Some law-books deny this right to a widow, but the greater number allow it. To give publicity to the adoption, it should be made known to the ruler, though if this was not done the adoption would not be invalid, if otherwise in accordance with the Shástr" (*v*). And in *Abajee Denkur* v. *Gungadhur Vasudeo Gosaee*, above cited, the Zillá Judge, Mr. Remington (some time also a Judge of the Sadr Adálat), who seems to have given the best judgment in the case, said: "The court considers authority to be in favour of this position, that though the widow should adopt with her husband's consent, she may act without it, *provided he has not expressed a desire not to have an adopted son*" (*w*). Although some of the Maráthá school may use the expression that the widow may adopt without the consent of the husband, this means simply without his express assent. The foundation underlying every adoption amongst Hindús is the consent of the husband. The only difference between the schools is that some require that it should be express, and that others are satisfied with an implied assent, and are ready to imply it if he have neither said nor done anything inconsistent with such an implication. The concession that there cannot be a valid adoption by the widow if the husband prohibit adoption, admits the necessity for his consent, express or implied, and so the Shástri in the Nágar Bráhman case perceived, as appears by his remark that "if he (the husband) did not prohibit it, it must be understood that he assented to it." And this assent is presumed, because the adoption is supposed by the Hindú religion

(*v*) 2 S. D. A. Rep., Morris, Part II., p. 7, note.

(*w*) 2 Morris' Rep., 423, 424.

to redound to the spiritual benefit of the husband. However, *expressum facit cessare tacitum.* Where, therefore, there is an express and reiterated refusal to adopt by the husband, both before and when he is *in articulo mortis*, there cannot be any implication to the contrary. And the reason which evidently influenced Rámákánt was an abiding reason, namely, his desire that his wife should continue in the enjoyment of his property, which would be defeated if he or she adopted a son to him. The indication of that desire implied a prohibition to her to adopt. I can easily conceive a case in which, although a man might say nothing on the subject of adoption, yet he might so act as completely to signify his intention that there should be none. Take for instance the case of a childless Hindú dying divided as to ancestral property from his family, and also leaving self-acquired estate, who makes a deed or will, leaving or assuring to his wife the enjoyment of all his property during her life, with remainder over to his brother as regards the ancestral property, and to his sister as regards the self-acquired property. An adoption by the widow under such circumstances, if allowed by law, would wholly frustrate the intentions of her husband. We have it on all sides laid down that the right to adopt is absolute in the husband, and the wife's assent is not necessary; 1 Stra. H. L. 78, and the answers of the Shástris at 2 Borr. Rep. 102. And see 4 Moo. Ind. App. 1 (*Rungama* v. *Atchama*); 3 Jagannátha's Dig., Colebr. Trans., pp. 244, 253, 254. Whenever a woman duly authorised adopts, it is on her husband's account and for his own sake, not her own: 1 Stra. H. L. 79 (*x*); "Filiation proceeds from the sanction only of the father:" Dattaka Mímaṁsá, Sec. I., pl. 19. The impossibility of such sanction after his death, alleged by Nandá Pandita (pl. 28), is surmounted by implying his assent, if he have not previously spoken or acted in a manner incompatible with such implication. The passage already above quoted (*y*) from Sec. I., pl. 24, of the Dattaka Chandriká, shows that the efficient legal and religious motive for the adoption is the affiliation of the son to the man, and that it matters not whether the woman be destitute of male issue, adoptive or natural-born.*

Mr. Sutherland in his Synopsis (*z*) observes: "The same reason which imposes the necessity of adoption on a man, not equally applying to a woman, the latter (at least such seems the more accurate and prevailing doctrine) is incapable, in her own right of adoption,

(*x*) And see 2 Stra. H. L. 88, 91 (Colebr. and Ellis); 94 (Sutherland); 98 (Colebrooke): 111 (Ellis); 116 (Ellis); 128 (Ellis).

(*y*) *Suprà*, page .

* Acc. *Chowdry Pudun Singh* v. *Koer Oodey Singh*, 12 Moo. Ind. App. 350, 356.—Ed.

(*z*) Head I., and notes v. and vi. (Stokes' H. L. B. 664, 671, 672.)

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though it is admitted that by his sanction she may affiliate on the part of her husband a son, who would necessarily be filially related to herself (*a*). Nandá Pandita denies *generally* the authority of a widow to adopt, assigning a reason by no means satisfactory, that the assent of her husband is impossible: but it is reasonable to admit, consistent with practice and the opinion of other authors, the validity of an adoption made by a widow under the sanction of her husband, written or formally expressed during his lifetime, and perhaps, in some places, under that of kinsmen." The reason for requiring, as we have seen some authorities do, the assent of kinsmen, is, no doubt, that they are, after the husband's decease, considered sufficiently to represent him to give on his behalf that assent which death prevents him from giving. But, as we have seen, his previous language or conduct may be wholly inconsistent with any possibility of vicariously substituting their assent on his behalf, or implying it to be his assent.

I am clearly of opinion that in this case the language of the husband has been such as to render it impossible to imply any authority in his wife, or any other person, to adopt, or assent to the adoption of, a son on his behalf, and that for that reason the alleged adoption here, if made, is null and void.

But, as already stated, beside the refusal (or implied prohibition) of Rámákánt to adopt, we have, upon a careful review of the facts of this case since the argument, unanimously come to the conclusion that for another reason it is impossible for the court to sustain the alleged adoption, and that it is unnecessary to send back the cause to the District Court for the examination of the widow or for further evidence.

Not only was the appellant a Hindú female, whom the law only barely recognises as *sui juris*—so careful does it require that the court should be in ascertaining that she has full knowledge of the nature and consequences of any acts affecting her legal rights, which she has been induced to perform (*b*)—but she was only seventeen years of age at the time of the alleged adoption (as was admitted in the course of the argument), and she could have had little more experience or knowledge of the world than a mere child. If she adopted, or assented to the adoption of, the infant plaintiff at all, she manifestly did so at the suggestion of the Bráhmans, Gumástás, and clerks who surrounded her, and who were the real actors on the occasion, and

(*a*) Acc. Datt. Chandriká, Sec. I., pl. 24.

(*b*) 1 Stra. H. L. 244; Manu, Ch. IX., pl. 2 and 3; 2 Stra. Notes of Cases at Madras, 159; Steele, 1st ed., p. 241, pl. 79; 2nd ed., p. 242. (And see 5 Calc. W. Rep., 246, decided since this case.—ED.)

who were desirous to transfer to their own hands the control and management of Rámákánt's property and firm during the minority of the infant plaintiff.

Looking at the effect of adoption upon the rights of a Hindú woman who succeeds to the property of her husband, we should expect clear evidence that she was fully informed of those rights, and of the effect of the act of adoption upon them;—an act which reduces her from the position of complete and absolute mistress of her husband's moveable property, and tenant, for life at least, of his immoveable property, to a mere right of maintenance (*c*).

Hindú women should be shielded from cajolery and undue influence with nearly all the jealous strictness with which the rights of a minor or other person not *sui juris* are watched—not an iota of which strictness should be abated in the instance of a widow just emerging from infancy, as was the case with the appellant at the time of the alleged adoption. Some relaxation of this strictness would, of course, be allowable in the case of a Hindú woman whose husband has directed that she should adopt. She is then under at least a moral duty to adopt, and the act of adoption by her is one which may justly be expected. It is different in the case of a woman whose husband leaves no such direction, because the act is one in derogation of her own right, and not in obedience to any order of her husband, and especially so in this case, in which the husband, from an anxiety to preserve his estate intact for his wife, has positively refused to adopt. If the conscience of the court were satisfied that the widow voluntarily performed the ceremonies absolutely essential for adoption, and had been previously fully informed, first, of her rights, and secondly, that the effect of an adoption upon them would be wholly to divest her of those rights and to reduce her to a maintenance, it would be the duty of the court to uphold that act of adoption, supposing the law to be that a widow may, at this side of India, adopt a son without the express authority of her husband—a question on which we do not consider it necessary, nor do we purpose now, to express any final opinion.

We not only have been unable to find any evidence, however slight, that Bayábái was informed, by any one or more of the persons who surrounded her, of the effect which adoption would have upon her own rights, but on the other hand we are satisfied that that was sedulously withheld from her knowledge, and that she never was informed of her rights or position. It is unnecessary to go beyond the evidence given on behalf of the plaintiff to show that previously

(*c*) 3 Moo. Ind. App. 229; 1 Stra. H. L. 101; 2 *Ibid.* 88, 116, 117, 127, 213, 214; 2 Morris' Rep. 19, 424; 1 Bom. H. C. Rep. 130; 3 Knapp, P. C. C. 35.

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to the alleged adoption she was never informed as to the effect such an act must have upon her rights. Tátiá Hari (No. 54), one of the witnesses for the infant plaintiff, says that Bayábái supposed she would be still owner of the property, and, on discovering that this was not to be the case, became insolent (*qu.* unkind) for two months to the boy (plaintiff), and then expelled him. From this and other evidence, we are quite certain that no pains whatever were taken to explain to the defendant Bayábái the legal consequences of the act which she is alleged to have performed, and that, on the contrary, she must have been studiously kept in the dark as to those consequences, and was unduly and, we think, fraudulently influenced by the Bráhmans and other persons around her. It is not to be endured that a young Hindú girl of tender years is, by an act done when she was thus hoodwinked, to be stripped of her property by the greed or fanaticism of those who may be around her. We think it unnecessary to go into the details of the evidence, and that it is enough to say that, looking at the whole mass of evidence in the case, we do not think that Bayábái has been fairly dealt with, or at all informed as to her rights or position, or as to the effect upon them of an adoption by her, before she was inveigled into the alleged act of adoption on which the plaintiff relies. The Hindú law abhors fraud or unfair dealing as fully as the English law, and treats all transactions effected either by the *suppressio veri* or the *suggestio falsi* as void (*d*).

For these reasons, we think that the decree of the District Judge is unsustainable, and ought, upon the third of the additional points of appeal, namely, that the appellant was cajoled into making the alleged adoption, by being kept in ignorance of her rights and of the effect of an adoption, to be reversed with costs.

Had I come to the opposite conclusion, and regarded the adoption as valid, I should have thought that the Judge was right in appointing the widow to be manager and receiver over the estate, and in requiring her to account annually; but I am strongly inclined to think that the annual sum allotted to her for maintenance would, having regard to the extent of the property, have been insufficient. But as we are of opinion that the alleged adoption was obtained by fraudulent means, and is, therefore, void, and that the decree, accordingly, should be wholly reversed, and the adoption declared null and void, those questions need not be considered, and the widow should be left in undisturbed possession of the property, without any condition as to accounting to the court, annually or otherwise.

(*d*) 1 Stra. H. L. 112, 202; 1 Macn. H. L. 124, 2 Jag. Dig. 181, 183, *et seq.*; (Colebrooke's transl.)

TUCKER, J., concurred in thinking that the defendant Bayábá had been circumvented by unfair means, and that an adoption procured, as the alleged adoption in this case, by suppression and misrepresentation of facts, could not be permitted to stand. It was clear to him that this youthful widow had been led by those around her to believe that the act of adoption would not divest her of her interest in the property of her late husband, and that she had not been fully informed as to her position and rights. He referred to Manu, Ch. VIII., pl. 165: "When the Judge discovers a fraudulent pledge or sale, a fraudulent gift or acceptance, *or in whatever other case he detects fraud, let him annul the whole transaction*," as the well-known rule of Hindú law, and to the repetition of the same passage in the Vyavahára Mayúkha (*e*), with this remark upon it: "Fraud, circumvention, *or in whatever other case*, that is, in whatsoever business. The meaning is, the whole of that business in which fraud is detected shall be reversed." He also adverted to the non-production of the deed alleged, on behalf of the plaintiff, to have been executed by Bayábái, and which appeared to have come into the custody of the parties opposed to her, as a very suspicious circumstance. No proper explanation had been given for the absence of that alleged deed. He was dissatisfied with the evidence in support of the plaintiff's case, and thought it quite clear that the widow had not been dealt with fairly. He, therefore, concurred in thinking that the decree must be reversed with costs.

As to the right of a widow in this Presidency to adopt without any authority from her husband, he did not consider it necessary now to give any final decision, but his opinion inclined in favour of that right, and of its having been sufficiently recognised by the courts of justice at this side of India. Further, he was inclined to think that she had that right, unless her husband expressly prohibited her from adopting, and that a mere refusal by him to adopt would not be sufficient. But on this point he would refrain from giving any positive opinion.

WARDEN, J.:—I concur in the observations of my brother Tucker.

Decree reversed, with costs.

(*e*) Ch. IX., pl. 10; and see Ch. II., pl. 5.

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Special Appeal No. 369 *of* 1865.

GOPA'L SHRI'DHAR DIKSHI'T PATVARDHAN, a Minor, by his mother, Bhavánibái .....(*Plaintiff*) *Appellant.*
NA'RO. VINA'YAK DIKSHI'T PATVARDHAN, PA'NDURANG VINA'YAK DIKSHI'T PATVARDHAN, and others.....(*Defendants*) *Respondents.*

Adoption—Consent of Relatives of Husband.

The doctrine that the consent of all her husband's relatives is requisite to make an adoption by a Hindú widow valid is erroneous.

GOPA'L sued Pandurang and six others for one-fourth of certain family property, alleging that his grandmother Sávitrí (through whom he claimed) had enjoyed the share up to 1861, when she died, and that the defendants would not put him in possession of it.

Pándurang answered that Sávitrí was his great-aunt, but had never enjoyed the property; and that though her husband, Lakshuman, was entitled to a fourth-share, he also had never enjoyed it, and that Sávitrí, who had been maintained by him, died one and a half years ago.

The answer of Prabhákar (another defendant) was, that he had heard that the plaintiff was a fourth-sharer; that he did not object to the claim, but that the disputed property was not in his possession.

Amrit Shrípat, the Munsif of Chiplun, in whose court the suit was brought, found that Gopál's father had been adopted by Sávitrí; that Sávitrí's husband was admittedly a fourth-sharer; that she had had occupancy within twelve years; that the *phárkhat* (or release) which Pándurang had set up was not proved; and that, therefore, Gopál was entitled to the share which he claimed. He, accordingly, decreed for the plaintiff.

Against this decision Pándurang preferred an appeal in the Court of the Senior Assistant Judge at Ratnágirí. W. H. Newnham (the Acting Senior Assistant Judge, who heard the appeal) held that the adoption of Gopál's father by Sávitrí was proved, but that it was invalid, because "the consent of Pándurang, who was the most concerned, as holding all the property now claimed, was not proved." He, therefore, reversed the Munsif's decision.

Against this decision a special appeal was preferred by the plaintiff. The appeal was argued before NEWTON and JANA'RDHAN, JJ.

Vishvanáth Náráyan Mandlik (with him *Ganpatráv Bháskar*) for the appellant, cited the following authorities in support of the

proposition that the consent of relatives was not necessary to make the adoption valid: *Bhasker Buchajee* v. *Narro Ragoonath* (*a*); *Abajee Dinkur* v. *Gungadhur W. Gosavee* (*b*); *Vishram Baboorow* v. *Narainrow Kasee* (*c*); Strange's Manual of Hindú Law, para. 106; I. Strange's Hindú Law, 93, 97; Vyavahára Mayúkha, Ch. IV., Sec. V.; Morley's Dig., Vol. I., Tit. Adoption, pl. 68, 70, 72, 103, and 107; Steele's Summary, p. 50, para. 37.

Dhirajlál Mathurádás, contrà:—The adoption of Gopál's father took place after Gopál was born, and, therefore, he had no right under that adoption.

Vishvánáth N. Mandlik, in reply:—The objection does not apply to *sagotras*: Vyavahára Mayúkha, Ch. IV., Sec. V., 19, 20.

NEWTON, J.:—In this case we consider that the Senior Assistant Judge has erred in law in considering that the consent of the defendant Pándurang was necessary to make the adoption valid. The fact that Pándurang was in possession of the major portion of the disputed property did not make his consent essential. The reason of adoption is not merely the proper devolution of property. It is stated that one male relative of Sávitrí's husband had consented, and if such consent were essential to the validity of the adoption—on which point we decide nothing in this case—we hold that the consent of one member, such as has been here held proved, is sufficient. It is urged by the respondent that Gopál, the plaintiff and special appellant here, gets nothing, because when his father, Shrídhar, was adopted by Sávitrí, Gopál was already born. We are of opinion that this objection will not hold. The authority of the Mayúkha, cited by the special respondent's Pleader, settles that question in the special appellant's favour; and, the parties being of the same *gotra*, the adoption of Gopál's father is good in law. The previously-born son succeeds to the adopted. We must, therefore, reverse the decree of the Acting Senior Assistant Judge, and confirm that of the Munsif with costs.

Decree reversed.

(*a*) Selected Decisions S. D. A. (1820—1840) 25.
(*b*) 3 Morris' Rep. 420. (*c*) 4 *Ibid.* 26.

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Sept. 1, 3, 10.

MHA'LSA'BA'I, widow.....*Appellant*

VITHOBA' KHANDA'PPA' GULVE .....*Respondent*

Adoption—Shúdrás—Only Son—Mother's power to give her son in ado[illegible]—Vibhut Vidá—Custom—Certificate—Discretion in requiring Security—Act XXVII. of 1860, Sec. 5.

Under Act XXVII. of 1860, Sec. 5, the Court granting a certificate has a discretion to determine whether or not it will require security to be given by the person to whom it grants it. The High Court will not, on appeal, review or interfere with the exercise of such discretion by the lower courts.

An adoption amongst Shúdrás is not necessarily invalid because the person adopted is an only son and is married, and has been given in adoption by his mother after her husband's death and without his authority. *

There is nothing in the books of authority amongst Hindús to show that a Vaishya who has undergone the ceremony of *vibhut vidá* is incapable of adopting a son. If a custom to that effect exists, it should be proved by satisfactory evidence.

THIS was an appeal to the High Court from an order made by Mr. Tucker, Judge of the District of Tháná, granting a certificate under Act XXVII. of 1860 to one Viṭhobá Khanḍáppá Gulve, enabling him to get in the debts and outstandings due to Khanḍáppá Moráppá Gulve, deceased.

Mhálsábái, the appellant, was the widow of Khanḍáppá Moráppá Gulve. From the evidence taken by the lower court, it appeared that after the death of Khanḍáppá Moráppá Gulve the respondent had been in the possession and management of the property of the deceased for four or five years—as he alleged, as owner, but as the appellant alleged, as agent and manager for her.

The respondent contended that he had been adopted by the deceased in his lifetime, and relied in proof of the adoption on a will alleged to have been made by the deceased subsequent to the adoption. When granting the certificate, the Judge did not require any security from the respondent under Sec. 5 of the Act

The appellant alleged that Viṭhobá was the only son of his natural parents, and had been given in adoption by his mother after his father's death, and without his previous sanction.

The appeal was argued before SAUSSE, C.J., and HERBERT and FORBES, JJ.

Westropp (with him *Dhirajlál Mathurádás*), for the appellant:—The Judge below has refused to take security from the certificate-

* See *Raje Vyankatrav Nimbalkar* v. *Jayavantrav bin Malharrav Ranadive*, 4 Bom. H. C. Rep., A. C. J. 191. See also *Balvantrav Bhaskar* v. *Bayabai et al.*, 6 Bom. H. C. Rep., A. C. J. 85, and *Subbaluvammal* v. *Ammakutti Ammal*, 2 Mad. H. C. Rep. 129.

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holder, as he ought to have done, in analogy with the practice in the case of the grant of letters of administration, and under the provisions of Sec. 5 of the Act (XXVII. of 1860). [HEBBERT, J. :—Has this court any jurisdiction to interfere with the discretion of the court below on the question of security?] [SAUSSE, C.J. :—Have you any authority to show that there is an appeal in cases where the court below has refused to take security?] Under the general powers of the court given by Reg. II. of 1827, Sec. 5, cl. 2 and 3, it could even now order the security to be taken, and Act XXVII. of 1860 must be considered as requiring that security should be taken. The word "may" occurring in statutes is often construed as "shall." Certainly it was the duty of the Judge to take security when persons other than the petitioner were entitled to, or interested in the property. If the Judge below has exercised an unwise discretion, this court, as a court of extraordinary and superintending jurisdiction, will review it. It ought especially to have been required in this case, for if the adoption is not proved the petitioner has no right whatever to the certificate he has obtained. The evidence of the adoption is quite untrustworthy, and the existence of a will rather tends to disprove it; but even granting that the *factum* of adoption did take place, the adoption is invalid: (I.) Because Vithobá was the only son of his parents, was married at the time of his adoption, and was given in adoption by his mother after the death of her husband and without his authority: Vyavahára Mayukha, Chap. IV., Sec. V., plac. 9, 36. [SAUSSE, C. J. :—Sir Thomas Strange, in the case of *The Rajah of Tanjore*, decided that the adoption of an only son was good.] But the boy must be given by his natural father, and must be given as a *dvyamushyayana*, as a son to both his natural and adoptive father. However, admitting for the sake of argument that the adoption of an only son is merely reprehensible, and not invalid, when given by the father, there is not any authority to show that the widow may give in adoption an *only* son. [SAUSSE, C.J. :—In case the father and mother of an only son were dead, and the son consented, could he not be adopted?] No. The father has a right to religious services from his son. The father can, however, consent to share them, but his consent is absolutely necessary for that purpose: Strange H. L. 85, 86. There is no authority for holding that an *only* son can give himself* or can be given in adoption by the mother without the father's consent, though she may so give a younger son under some circumstances. (II.) This adoption is invalid, because Khandáppá, at the time of the adoption,

* See 2 Mad. H. C. Rep. 129 and 6 Bom. H. C. Rep., O. C. J. 85, reported since the case in the text was decided.

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had undergone the ceremony of *vibhut vidá*.* This would appear to be similar in its effects, amongst the people of the caste to which the parties here belong,† to the ceremony of *sanyás* amongst Hindus of a higher caste. After undergoing that ceremony Khandáppá became *civiliter mortuus*, and no act of his could divest his widow, Mhálsábái, of her estate. That the ceremony was performed before the adoption, was proved by Mhálsábái herself.

White and *Reid* (with them *Vishnu Moreshvar*), for the respondent:—The Court has no power to interfere with the discretion of the District Judge as to the taking of security. The Act (XXVII. of 1860) itself gives no appeal in such a case, and by implication takes away any right to appeal that might have been conferred by previous enactments. There is ample evidence of the adoption having taken place, and the objections to its validity are groundless. The rule of Hindú law which prohibits the adoption of an only son is merely directory, and does not invalidate the adoption of such a son actually completed: I. Strange H. L. 87; Dig. H. L., Bk. V., Ch. IV., Sec. 8, pl. cclxxii. and cclxxiii. The maxim *quod fieri non debuit factum valet* is followed in such cases. The text of Vasishtha in the last-quoted passage apparently applies as well to the taking in adoption as to the gift, but it would seem to be rather in the nature of a religious injunction than a legal prohibition: see Miták., Ch. I., Sec. XI., pl. 11, and notes by Colebrooke; and Vyavahára Mayúkha, Ch. IV., Sec. 5, pl. 2. The restriction, if it exists, does not affect Shúdrás, and when the adopted son is, as here, the son of the sister of the adopter: Vyavahára Mayúkha, Ch. IV., Sec. 5, pl. 10, 11, and 36; Steele, pp. 51, 184 (1st ed.). Then it is said that there was no one empowered to give Vithobá in adoption, his father being dead, and the mother not having the power; but that is not so: the mother is fully competant, without the sanction of her husband, to give in adoption after the death of her husband: Vyavahára Mayúkha, Ch. IV., Sec. 5, pl. 17 and 18; Macn. P. H. L., Ch. VI. The adoption of a youth like Vithobá would, however, seem to be rather a case of self-giving, like the *arrogatio* of the Civil Law and the *Svadat* of the ancient Hindú Shástra, still partially surviving in modern customary law. Chandeshvar and other Hindú jurists seem to have taken this view of such cases: Digest (Jagannáthji), Bk. V., Ch. IV., Sec. VIII. See too

* *Vibhut* (विभूत), ashes applied to the forehead by the Lingáyat Shaivas. *Vidá* (विडा)—*pán supári*, &c. made up into a small parcel ready to be eaten.

† In the lower court the case was argued on the footing of the parties being Shúdrás, but Mr. Westropp in argument stated that his instructions were that they were really Vaishyás or Lingáyats. See Steele's Hindú Caste, p. 105 (edn. of 1827).

the cases collected in I. Morley's Digest (Adoption), pl. 62-64, 69. As to Vithobá's age, twenty-five is the limit as to the age of the adoption in the great majority of Maráthá castes, and even the few castes which require that the boy should be given before the *munj* ceremony or before marriage allow the adoption of a near relation's son after that period : Steele, Appx. A.

With reference to the second objection, that the adopter, Khandáppá, was incapacitated from adopting by reason of his having undergone the ceremony of *vibhut vidá*, there is no allusion even to the existence of such a ceremony to be found in the books on Hindú law. It would require precise and reliable evidence to establish a custom giving to this ceremony the effects contended for, but the testimony adduced before the court below on this point, and on the fact of such a ceremony having been undergone by Khandáppá, is vague and unreliable.

Westropp, in reply :—Assuming that with the father's sanction an only son may be adopted amongst Shúdrás, we contend that the authorities do not show that an only son can be given, or give himself, in adoption without his father's consent. The reason is a religious one. The natural father is entitled at the hands of his only son to plenary funeral rites, and of this he cannot be deprived without his consent, and *ex post facto*, by his son or widow, though he may doubtless in his lifetime agree to share the future right to those ceremonies with another person if he be so minded. There may be a moral duty on the part of the widow of a childless husband to adopt a son, but the duty of the widow or wife of a man having an only son is, for the same reason, wholly opposed to the giving of such a son in adoption. The father's consent cannot be implied to an act so fatal to his spiritual interest.

At the close of the argument the court directed the following question to be put to the Shástri :—

Question.—"To A'zam (exalted) Vináyak Lakshman, Shástri of the High Court, the question of the said court is as follows :—There being an only son of the Shúdrá class, (and) his father being dead, could he, after he has come of age, become by consent of his mother the adopted son of his maternal uncle? Let the answer hereto be written below this, with the passages in support thereof from the books (of authority). 3rd September, *Anno Christi* 1862."

Answer.—"In Mayúkha, a Smṛiti (recollection) of (the sage) Vasishṭha is thus (given) :—'One, meaning perhaps an only son, is neither to be given nor received?' The meaning of this Smṛiti is written by the author of Mitákshará thus :—'The prohibition regarding the giving of one (only) son applies only to the giver. Nevertheless this meaning of the author of the Mitákshará is not consistent with what is the plain meaning of the Smṛiti passage. Therefore, the giving of one (only) son seems to be prohibited.

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Now among Shúdrás, if a mother gives her son, of age, to her brother to be adopted, there is no objection. So it is stated in Mayúkha. May this be known to the Khudávans (divine personages).

Authorities.—"Mayúkha, p. 107, line 7:—'One (only) son should neither be given or received, (because) he saves persons.' (The Shástri's meaning:) One son should not be given and received, because he saves his foreborn (*i.e.*, predeceased). [That is, by performing their funeral rites, the *Shrádddhs* at Gaya, &c., he conveys his foreborn upwards (to heaven)].

"Mitákshará Vyaváradhaya, leaf 54, side 1, line 3:—'From the use of poverty (it follows that) in prosperity (the son) should not be given.' This prohibition is the giver's (*i.e.*, applies to him). Meaning: Because it is said that in adverse time the son should be given, in the absence of adverse time (the son) should not be given. This prohibition applies to the giver. So the prohibition that one (only) son should not be given (also) applies to the giver alone.

"Mayúkha, p. 109, line 3:—"He who is married, and even he who has a child (or children), can become an adopted son.' Meaning: He who is married, or even he who has a son, (can) become an adopted son. (From this there seems to be no objection to a grown-up son being an adopted son.)

"Mayúkha, page 102, line 4:—'Let the mother or father give.' Meaning: Either the mother or father should give the son to be adopted.

"Mayúkha, page 105, line 8:—'A daughter's son and a sister's son should be given to a Shúdrá only.' Meaning: A daughter's son and a sister's son should be given to a Shúdrá.

VINA'YAK LAKSHMAN SHA'STRI.

4th September, Anno Christi 1862.

Sept. 10. SAUSSE, C.J., delivered the judgment of the court:—

Our judgment in this case is formed without reference to the opinion of the Shástri. This was an application for a certificate of administration under Act XXVII. of 1860. The certificate under the Act gives merely a power to collect the debts of a deceased person, and make over the money, when collected, to the person entitled to them as owner. This Act gives the court a discretion in taking security from the person to whom the certificate is granted, and so did Act XIX. of 1841; and the whole course of legislation on this subject proceeds on the assumption that the court below is to exercise its discretion; and we do not think we should be justified in interfering with that discretion.

The appellant Mhálsábái is the widow of Khandáppá. Khandáppá died as a separated brother without natural issue. *Primâ facie* Mhálsábái would be the legal heir, and be entitled to the certificate to collect debts. But Vithobá interfered with her *primâ facie* title. He said that he was brought up from his infancy by the deceased; that his marriage was performed by him at his own ex-

pense; that he was living at his house up to the time of his death, and that shortly before his death he was adopted by him. The adoption was made in a public manner; the respondent continued after his uncle's death to manage the estate; and he was treated as his adopted son by Mhálsábái herself and by others. There is no doubt in our mind as to the fact of the adoption. Two objections to it were, however, raised. They are legal objections such as, if well founded, would make the adoption invalid, and leave the whole property to the widow. The first objection is that Khandáppá was not in a legal position to adopt a son, because he had undergone the ceremony of *vibhut vidá* some days before his death, the effect of which, like that of *sanyás*, was said to be that the person undergoing it abandoned worldly matters. We have great doubt as to whether this ceremony took place at all; or that its effects proved to be similar to those of *sanyás*. No authority has been shown as to the existence of this ceremony having been recognised by works on Hindú law; and if there is no written law on the subject, the only mode of proving its effects is by evidence of custom or usage having the force of law. It is clear, upon the evidence before us, that there is no custom or generally established usage proved as to the effect of this ceremony, even if we were of opinion that it took place. As there is no written law, and as no custom or usage has been proved, effect cannot be given to the objection. We, therefore, think that we must treat Khandáppá as having been at perfect liberty to adopt a son.

The second objection to the legality of the adoption is that there can be no adoption without the consent of the father; that a widow cannot give her son in adoption without authority, express or implied, from her husband. That proposition is at variance with the books on Hindú law. In I. Strange 82 it is thus laid down: "Of her own mere authority, the mother cannot, in general, give her son to be adopted, any more than she can adopt, her husband living; unless he have emigrated, or entered into a religious order. But his assent may be presumed; and after his death she does not want it, a widow having this power, and a wife also, if the distress be urgent." But this power does not exist only in distress. I. Strange 81: "Nor is it necessary that it should proceed, as commonly supposed, from any public calamity, such as actual famine, provided it be sufficiently urgent. And though there should be no distress to justify the gift, it will be good notwithstanding: not being vitiated by the breach of a prohibition which regards the giver only, not affecting the thing done." And I. Strange 95: "There must be gift and acceptance, manifested by some overt act. Beyond this,

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legally speaking, it does not appear that anything is absolutely necessary." In the Mitákshará, to which Sir Thomas Strange refers, it is said that if the son is given by the mother in the father's absence, or in case of his death, it is a good adoption; and, with reference to distress the same authority says that the prohibition regards the giver only. It is very clear, upon the evidence, that Vithobá's mother was present when the ceremony took place; and her consent must, therefore, be presumed. There is then the giving in adoption of a son after the death of his natural father and with the consent of his mother. That he is an only son can make no difference, for it is plain that the father can give an only son in adoption; and the mother, after the father's death, can exercise his power of giving in adoption, and if he have not previously in his lifetime manifested dissent, his assent will be implied: Dattaka Chandriká, Sec. I., pl. 31, 42; Colebrooke's note to Miták., Ch. I., Sec. II., pl. 9; Vyavahára Mayúkha, Ch. IV., Sec. V., pl. 1. And no authority has been cited to show that she has not this power in the case of an only son. In the Vyavahára Mayúkha, Chap. IV., Sec. V., pl. 19, it is said that "a married man, who has even had a son born, may become an adopted son." The authorities appear, upon the case argued, to bear out the view of the Judge below.*

The widow however, unfortunately, is not concluded by the opinion given with reference to the evidence adduced upon the application for the certificate. She may institute a regular Civil suit. Upon the whole, we think that the certificate was properly granted, and the Judge's discretion with regard to the taking of security was properly exercised. The adoption took place in the presence of Mhálsábái, who could then have made any objection she had to it. As she made no objection at the time, and allowed Vithobá to manage the estate for six years, during which it was notorious that he went by his adoptive father's name, the opposition made by her, when Vithobá applied for a certificate, was clearly vexatious. The certificate would not have deprived her of her rights (if any), as it was a certificate merely to collect debts. She must be ordered to pay the costs of this proceeding.

Order accordingly.

* See *Vishram Baboorow* v. *Narainrow Kasee*, 4 Morris' S. D. A. Rep. 26.— ED.

Special Appeal No. 373 of 1863.

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Nov. 16.

ANANDRA'V SIVA'JI *et al.* .....*Appellants.*
GANESH ESHVANT BOKI'L .....*Respondent.*

Adoption—Acquiescence for a lengthened period—Presumption.

Where an adoption had been acquiesced in for a period of thirty-three years, it was presumed that the necessary consent of some person competent to give away the adopted son had been obtained.

THIS was a special appeal from a decision by Baron De H. Larpent, Judge of the Puṇá District.

Ganesh was the plaintiff, and brought this action in the Court of the Munsif of Tallegám against Anandráv and Trimbak, setting forth that as the son of one Eshvant A'ko Bokíl, he was his heir, and, as such, was in possession of his real and personal property; that his deceased father was, during his lifetime, entitled to certain annual payments from the Treasury of the Collector of Puṇá, to which the plaintiff on his father's death ought to have succeeded, but which the Collector declined to pay to him until he should produce a certificate of heirship to his deceased father; that on applying for this certificate in the usual form he was opposed by the defendants, and that the Judge, declining to issue the certificate of heirship, referred both parties to a civil action; that the plaintiff, accordingly, brought the present action to receive a sum of Rs. 706, being the amount then outstanding, to obtain a declaratory order affirming his right to the aforesaid certificate of heirship, and to receive the amount then to the credit of his deceased father in the Collector's books.

The defendants contended that the plaintiff was the son of Eshvant, a man given in adoption, but born six or seven years before the adoption of his father was alleged to have been made, and, therefore, not entitled by right of inheritance to the pension of Eshvant; that Eshvant's adoption into the family of A'ko Sakhárám was not a valid adoption; that the defendant Anandráv was the nearest heir to the deceased; and that for these reasons the plaintiff was not entitled to the declaratory order he sought.

The Munsif of Tallegám gave judgment in favour of the plaintiff, on the ground that the objections urged to the adoption of Eshvant by Godubái, the widow of A'ko Sakhárám—namely, that there was no one to give him away in adoption, and that the person adopted had issue of his own at the time of adoption—were not such as, under

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the rulings of the Sadr Adálat, should be allowed to invalidate an adoption; that no objection was taken with respect to Eshvant's adoption until his death; and that, the adoption being valid, the plaintiff, though born to Eshvant prior to Eshvant's adoption by A'ko, was nevertheless by Hindú law as much a member of A'ko's family as Eshvant himself.

An appeal was preferred from this decision to the Judge of the District of Puṇá, who on the hearing of the appeal decided as follows, confirming the decree of the Munsif:—

"The Court finds that the questions for decision are—

1*st*—"Whether the adoption being informal, it is, therefore, null.

2*nd*—"If not, whether the respondent is the heir of the deceased Eshvant."

"In regard to the first question, the Sadr Adálat has decided that no point of Hindú law is more firmly decided than that an adoption made in proper form cannot be set aside, though both the giver and receiver in adoption may have committed sin in allowing it.

"It appears that on the 17th of June 1825 Mr. Chaplin wrote that if there be no objection on the part of the relatives the adoption may be permitted.

"In 1858 Eshvant died, and for a period of about thirty years was recognised as the adopted son of Godubái, and lived in the same village as the appellant Anandráv, who was perfectly aware of the fact.

"By exhibit No. 59 it appears that both defendants admitted that Eshvant was the adopted son of Godubái, for in this document, which is a *yád* in which the division of a (family) *vahivat* at Sásur is agreed on, Eshvant, deceased, is one of the contracting parties and styled Eshvant A'ko.

"The evidence to be drawn from exhibit No. 60 is of the same import. By exhibit No. 4 it appears that Anandráv stated that Eshvant had been informally adopted by Godubái; and exhibit No. 5 shows that Trimbak Govind stated the same thing.

"The evidence proves that the relatives of the deceased Godubái have tacitly consented for a period of about thirty-three years to the adoption of Eshvant, now deceased. After a period of thirty years, therefore, the son of the present respondent is called upon by the relatives of Godubái to prove that his deceased father was formally adopted. Witness No. 134 proves that the religious ceremonies were performed on the occasion, and although it appears that Go-

dubái died before the formal consent of Government was obtained; yet this fact cannot be held to invalidate the adoption.

"The Court finds that the adoption of the deceased Eshvant was valid.

"In regard to the second point, the Shástri has stated (exhibit 160, 37) that a son born previous to adoption enters the family with his father, and is, therefore, his heir.

"The Munsif's decree is confirmed, with costs on the appellant."

From this decree a special appeal was preferred by the original defendants to the High Court, on the ground among others that the Judge erred in confirming an adoption which was invalid by reason of the adoptee being an only son, of mature age, married, and having a large family, and by reason of the adoptee having given himself away in adoption; but at the hearing all the points except the last were abandoned, and the appellant took his stand on the ground that, the adoptee having given himself away in adoption, the adoption was invalid: gift, by some one other than the person being adopted, and acceptance were essentials to the validity of an adoption.

The appeal was argued before NEWTON and TUCKER, JJ.

Vishnu Moreshvar, for the appellants, argued that under the circumstances the adoption was invalid.

Dhirajlál Mathurádás, for the respondent, contended that, more than thirty years having elapsed since the adoption was said to have taken place without its being objected to, its validity could not be called in question.

PER CURIAM:—The Court considers that as the adoption has been acquiesced in, as found by the court below, for a period of thirty-three years, it must be presumed that the necessary consent of some person competent to give away the adopted son had been obtained, and that the adoption should, therefore, be upheld.

Decree confirmed.

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